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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

JOHN O. ZIPPERER, JR., an individual,

Petitioner,

vs.

THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependent Special District known as Colonial Road Extension Improvement Special District; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause of the Fourteenth Amendment requires a public body to give prior actual written notice to the owner of a prior-recorded first mortgage lien, whose address is easily ascertainable from the public records, of special assessment hearings which create enormous "super-priority" special assessment liens that immediately and drastically diminish the value of the prior-recorded first mortgage lien by subordinating the first mortgage lien to the super-priority special assessment liens?

2. Does the decision of the court of appeals below, which holds that an owner of a prior-recorded Florida first mortgage lien is not entitled to prior actual notice of the subordination of his first lien to millions of dollars of super-priority special assessment liens, conflict with this court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) which holds that a super-priority lien arising from a tax sale does immediately and drastically diminish the value of a prior-recorded mortgage lien?

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

JOHN O. ZIPPERER, JR.

Respondents:

The City of Fort Myers, a chartered municipality and political subdivision of the State of Florida; Fort Myers City Council, as Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Fort Myers City Council, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; Fort Myers City Council, as the Governing Authority of Improvement District No. 17; Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Improvement District No. 15, Omni Interstate Park; Improvement District No. 17; Lee County, a political subdivision of the State of Florida; Colonial Road Extension Improvement Special District Board, as the Governing Authority of the Defendant Special District known as Colonial Road Extension Improvement Special District; Colonial Road Extension Improvement Special District.[1]

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[1] Although not a named party, the State of Florida filed amicus curiae briefs in support of the Respondents' position in both the Court of Appeals and District Court below and has been served with this Petition.

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THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependent Special District known as Colonial Road Extension Improvement Special District; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, John O. Zipperer, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on January 3, 1995, rehearing denied February 10, 1995.

OPINIONS BELOW

The Judgment and opinion of the Court of Appeals for the Eleventh Circuit for which review is sought is reported as *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995) and is reprinted in the Appendix. (App. A). The Order and accompanying Memorandum of the United States District Court for the Middle District of Florida granting summary judgment is unreported and reprinted in the appendix. (App. B). Additionally, the unreported February 10, 1995 Order of the Eleventh Circuit Court of Appeals denying Mr. Zipperer's and the City of Fort Myers requests for rehearing is also reprinted in the appendix. (App. C).

STATEMENT OF JURISDICTION

Judgment was rendered by the Court of Appeals for the Eleventh Circuit on January 3, 1995 and rehearing was denied on February 10, 1995. On March 8, 1995, the Court of Appeals granted Petitioner's Motion for Stay of the Mandate until May 8, 1995.

This Court's jurisdiction to review a judgment and opinion of the United States Court of Appeals for the

Eleventh Circuit is invoked pursuant to 28 U.S.C. § 1254(1). This petition is filed within 90 days of the entry of the Eleventh Circuit's order denying petitioner's motion for rehearing in accordance with 28 U.S.C. § 2101(c) and U.S. Supreme Court Rule 13.4.

Federal Court Jurisdiction of Mr. Zipperer's cause of action is proper pursuant to 28 U.S.C. § 1331 as a federal question action which arises under the United States Constitution. The Tax Injunction Act (28 U.S.C. § 1341) does not bar federal court jurisdiction of this action because, for the reasons cited in the Eleventh Circuit's Opinion, the Petitioner has no "plain, speedy and efficient remedy" available in the Florida courts and because the petitioner does not seek to "enjoin, suspend or restrain" the collection of a tax.[2]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV, Section 1 of the United States Constitution provides in pertinent part:

> nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

Due to its length, *Florida Statutes*, Chapter 170 (1993) is reproduced in its entirety in the Appendix. (App. E). The

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[2] The City filed a Petition for Rehearing (App. D) arguing that the federal courts did *not* have jurisdiction of Mr. Zipperer's suit and citing for example, *Tramel v. Schrader*, 505 F.2d 1310 (5th Cir. 1975).

applicable portion of Chapter 170 dealing with the notice of special assessment hearings is *Florida Statutes* 170.07, which reads in pertinent part:

> Upon the completion of said preliminary assessment roll, the governing authority of the municipality shall by resolution fix a time and place at which the *owners of the property* to be assessed *or any other persons interested therein* may appear before said governing authority and be heard as to the propriety and advisability of making such improvements, as to the cost thereof, as to the manner of payment therefor, and as to the amount thereof to be assessed against each property so improved. *Ten days' notice in writing of such time and place shall be given to such property owners*. . . . Notice of the time and place of such hearing shall also be given by two publications a week apart . . . provided that the last publication shall be at least 1 week prior to the date of the hearing.

The applicable portion of Chapter 170 dealing with the imposition of super-priority special assessment liens is Florida Statutes 170.08, which reads in pertinent part:

> At the time and place named in the notice provided for in s. 170.07, *the governing authority of the municipality shall meet and hear testimony from affected property owners as to the propriety and advisability of making the improvements and funding them with special assessments on property.* Following the testimony, the governing authority of the municipality *shall make a final decision on whether to levy the special assessments.* Thereafter, the governing authority *shall meet as an equalizing board to hear and consider any and all*

> *complaints as to the special assessments and shall adjust and equalize the assessments on a basis of justice and right.* When so equalized and approved by resolution or ordinance of the governing authority, a final assessment roll shall be filed with the governing authority of the municipality, and *such assessments shall stand confirmed and remain legal, valid, and binding first liens* upon the property against which such assessments are made until paid. . . .

STATEMENT OF THE CASE

A. Factual Summary

On August 14, 1986, P. Gerald DeSimone, as trustee, executed and delivered a promissory note for $8,900,000.00 to Mr. John O. Zipperer, Jr. ("Mr. Zipperer"). To secure the promissory note, Mr. DeSimone delivered a first mortgage to Mr. Zipperer which was recorded that same day in Official Record Book 1862, pages 4282-4286 of the Public Records of Lee County, Florida. The Mortgage granted Mr. Zipperer a first mortgage lien on the real property described in the mortgage, prohibited impairment of the property by Mr. DeSimone and stated Mr. Zipperer's name and mailing address.

After the recording of the first mortgage lien, the City of Fort Myers and Lee County, Florida created special assessment districts which included the mortgaged property. These districts built unnecessary and ultimately worthless highways, sewers and water lines which would

never have been built through normal commercial institution lending. Then, between March 7, 1988 and October 24, 1990, the City of Fort Myers and Lee County held a series of special assessment hearings. They then passed resolutions at those hearings which purported to create huge super-priority special assessment liens on properties located within the special assessment districts. The resolutions passed by the City of Fort Myers created an estimated $13,000,000 of special assessment liens for water and sewer facilities in Improvement District 10, an estimated $10,900,000 in special assessment liens for water distribution, wastewater collection, roadway and paving improvements in Improvement District 15; and an estimated $6,017,000 in special assessment liens for roadway improvements in Improvement District 17. Collectively, the resolutions passed by the City of Fort Myers also provided that a total of $919,600 in special assessment funds were to be paid to the City for "administration" of these special assessments. The resolutions passed by Lee County also purported to create super-priority special assessment liens in the amount of $4,791,325 for roadway improvements in the Colonial Road Extension Special Improvement District. All the special assessment liens created at these hearings purported to take priority over and subordinate Mr. Zipperer's first mortgage lien.

Mr. DeSimone, the owner, was given prior written notice of each of these special assessment and lien creation hearings. Under Florida Statutes, Chapter 170 (App. E) written notice only went to the property owner (who already knew of the special assessments because he requested them) but not to owners of first mortgages which would be subordinated by the super-priority

assessment liens. Neither the City of Fort Myers nor Lee County gave Mr. Zipperer prior written notice of any of these special assessment hearings and Mr. Zipperer did not participate in those hearings. Instead of providing mortgagees, such as Mr. Zipperer, with prior written notice, the City of Fort Myers and Lee County merely published notices of the special assessment hearings in a local newspaper. The published notice did *not* disclose that the assessment liens would subordinate prior recorded mortgages.

On April 18, 1991, after the purported creation of these super-priority special assessment liens, Mr. Zipperer filed a foreclosure action on the mortgaged property in Florida's 20th Judicial Circuit in and for Lee County, Florida. On November 26, 1991, the court granted Mr. Zipperer a Judgment of Foreclosure and the mortgaged property was subsequently sold and a certificate of title issued to Mr. Zipperer on February 4, 1992. Mr. Zipperer then filed a motion for relief from foreclosure judgment to the extent made necessary by the claimed super-priority special assessment liens and simultaneously filed a lawsuit in the Federal District Court for the Middle District of Florida seeking to resolve the Federal Question raised by the City of Fort Myers and Lee County's alleged super-priority special assessment liens.

B. Procedural History

Mr. Zipperer filed his original complaint in this action on November 25, 1992, which was amended on October 27, 1993. This case presents a federal question

under 28 U.S.C. § 1331 because the amended complaint alleges both the City of Fort Myers and Lee County denied Mr. Zipperer procedural due process when they failed to provide Mr. Zipperer with prior written notice of special assessment hearings which materially and adversely affected Mr. Zipperer by imposing special assessment liens which purported to subordinate Mr. Zipperer's prior-recorded first mortgage. Mr. Zipperer's name and address were clearly stated in the prior-recorded mortgage. As a direct result of the City's and County's failure to provide Mr. Zipperer with notice, Mr. Zipperer lost a significant property interest when his first mortgage was subordinated to a junior lien without Mr. Zipperer's prior knowledge. Mr. Zipperer's request for relief asked that the court grant declaratory relief, a prioritization of the liens, foreclosure of the City of Fort Myers and Lee County's special assessment liens, compensatory damages and such other relief as would be just, necessary and proper.

After a hearing on the Defendants' motions to dismiss or in the alternative motions for summary judgment, the District Court granted summary judgment and dismissed the case. (App. B). The exact basis for the District Court's holding was unclear. On one hand, the District Court stated "the theory of the plaintiff now at bar" had been put to rest. (App. B, B3). On the other hand, the District Court held that "procedural due process requires an opportunity to be heard either pre- or *post*-action" and that "[i]n this type of case the State of Florida gives the plaintiff ample opportunity to litigate this question." (App. B, B3).

On January 3, 1995, the Eleventh Circuit Court of Appeals issued an opinion, affirming the District Court's Order granting summary judgment, which is reported as *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995) (App. A). After determining that the Federal Courts had jurisdiction of Mr. Zipperer's claims, the Eleventh Circuit denied Mr. Zipperer's procedural due process claim, though it noted that the United States Supreme Court had never directly addressed the issue presented.

Mr. Zipperer and the City of Fort Myers both filed timely motions for rehearing. The City of Fort Myers requested the court to reconsider its holding that the Tax Injunction Act did not bar Federal Jurisdiction of this case. (App. D). Both motions were denied by the Eleventh Circuit on February 10, 1995. (App. C).

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit Court of Appeals decided an important question of federal law in a manner that conflicts with the rationale of this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) and deprives Mr. Zipperer, a prior recorded first mortgage lienholder, of his constitutional right to actual prior written notice of special assessment liens which immediately and substantially diminish Mr. Zipperer's constitutionally protected property right in his first mortgage lien in violation of the Due Process Clause of the Fourteenth Amendment.

The fundamental issue in this case is whether a local government, without providing actual prior written

notice and an opportunity to be heard to a mortgagee, can subordinate a first mortgage to millions of dollars of special assessment liens for unnecessary and ultimately worthless improvements without violating the Due Process Clause of the Fourteenth Amendment. Mr. Zipperer's name and address were stated in the mortgage and recorded in the Lee County Public Records. The City and County, which received nearly a million dollars for "Administration" expenses, merely had to pay for a stamp and letter to Mr. Zipperer to inform him of the special assessment and lien imposition hearings. If the City and County undertook this minimal effort, then this petition would not be before this Court.

In its opinion below, the Eleventh Circuit noted that:

> Since the *Mennonite* decision, neither the Supreme Court nor this Circuit have addressed whether the imposition and prioritization of special assessments on mortgaged land, as opposed to a tax sale of mortgaged land, constitute a deprivation.

Zipperer v. City of Fort Myers, 41 F.3d 619, 624 (11th Cir. 1995) (App. A, A11).

The Eleventh Circuit held that the imposition of such super-priority special assessments do not immediately and drastically impair a mortgage lienholder's interests in a manner that amounts to a deprivation under this Court's opinion in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). Mr. Zipperer has brought this Petition before this Court because the Eleventh Circuit's analysis on this point is fundamentally flawed and conflicts with this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983). The Eleventh Circuit focused

its analysis exclusively on the special assessments effects upon the landowner's property interest and ignored the effects of the imposition of the super-priority special assessments upon Mr. Zipperer's (the mortgagee's) interest in his first mortgage lien.

The Eleventh Circuit acknowledged that:

> had there been a tax sale of the mortgaged property which nullified Zipperer's entire interest as a mortgagee, Zipperer's interest would have been as "immediately and drastically diminished" as the mortgagee's interest in *Mennonite*.

Zipperer, 41 F.3d at 624 (App. A, A10, A11).

The Eleventh Circuit's assumption that the result of the tax sale in *Mennonite* was the entire nullification of the mortgagee's interest, however, was incorrect. As this Court noted in *Mennonite*, the result of the tax sale was not the complete abrogation of the mortgagee's property interest but rather the creation of a super-priority lien which:

> immediately and drastically diminishes the value of this security interest [the first mortgage] by granting the tax-sale purchaser a lien with priority over that of all other creditors.

Mennonite, 462 U.S. at 798.

In fact, under the Indiana Tax Sale Statute found unconstitutional in *Mennonite*, the mortgagee's interest could not be nullified until two years after the sale of the tax certificate when, in the event that the amount of the assessment or tax had not been redeemed, the certificate holder applied for and was issued a tax deed. *Id.* at

793-794. Upon receiving the tax deed, the tax deed purchaser may initiate an action to quiet title to which there are a limited number of affirmative defenses. *Id.* at 794. The *Mennonite* decision arose from a quiet title action brought by a tax deed purchaser under that statutory scheme. *Id.* at 795.

Additionally, in *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), the court explicitly found that:

> It is not necessary for a proceeding to directly adjudicate the merits of a claim in order to "adversely affect" that interest. In *Mennonite* itself, the tax sale proceedings did not address the merits of the mortgagee's claim. Indeed, the tax sale did not even completely extinguish that claim, it merely "diminished the value" of the interest. 462 U.S. at 798, 103 S. Ct., at 2711. Yet the court held that due process required that the mortgagee be given actual notice of the tax sale. [citations omitted]

Id. at 488.

Likewise, in *Connecticut v. Doehr*, 501 U.S. 1 (1991) this Court clearly stated:

> [T]he Court has never held that only such extreme deprivations trigger due process concern [citation omitted]. To the contrary, our cases show that even the temporary or partial impairments to property rights that attachments, liens and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, "are subject to the strictures of due process." [citations omitted]

Id. at 11.

Furthermore, regarding the issue of the effect that the subordination of a first mortgage lien to a lien created by a county ordinance has upon a mortgagee's interest under Florida law, a Florida District Court of Appeal has stated:

> We think the priority provision of the County's ordinance substantially impairs Coast Federal's prior mortgage lien by subordinating it to the County's lien. . . . The County posits that if the land is of sufficient value both liens can be satisfied, and Coast Federal will not have been adversely affected by the priority provision. We disagree with the County's position.
>
> We need not consider the value of the underlying property because the priority provision has worked an immediate impairment on Coast Federal's pre-existing mortgage lien. The nature of priority is such that Coast Federal is automatically at a substantially greater risk of losing its investment if it has only a second, as opposed to a first, priority lien. Furthermore, mortgages held by commercial institutions are frequently sold on the secondary market, and the subordination of Coast Federal's lien impairs the marketability of its mortgage. This immediate diminishment in the value of Coast Federal's contract is repugnant to our [Florida and Federal] constitutions. [citations omitted].

Sarasota County v. Andrews, 573 So.2d 113, 115 (Fla. Dist. Ct. App. 2d Dist. 1991).

Despite acknowledging the existence of the *Andrews* decision, the Eleventh Circuit held that it stood merely for the proposition that a mortgagee has a property right in the preservation of its mortgage interest and ignored the

Andrews court's discussion of the drastic negative effect that the imposition of a super-priority lien has upon that property right.

Furthermore, the Eleventh Circuit's decision in this case is also contrary to this Court's decision in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950) which holds that the due process protections of "notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" must be afforded to all parties whose property interests will be affected by such an action. Even the Eleventh Circuit recognized that a lien creation proceeding, such as the special assessment hearings in this case, is certain to have an effect upon Mr. Zipperer's property interest in his first mortgage lien. The Eleventh Circuit, however, held that:

> [A] special assessment lien prioritization constitutes a constitutional deprivation only if it is so palpably punitive or as arbitrary as to confer no benefit on the landowner, or "force[s] a landowner to make an improvement that while valuable to others, is useless to him."

Zipperer, 41 F.3d at 625 (App. A, A14).

The prior notice requirements of *Mullane*, however, do not depend upon a post-hoc analysis of how severely a property interest actually was affected by a particular proceeding. Instead, they are triggered by the risk that such a deprivation will occur and such a risk exists at the special assessment and lien prioritization hearings. The severity of such a risk is evidenced by the fact that the Eleventh Circuit stated that:

> We find it inappropriate to scrutinize the exact costs and benefits of municipal improvements in a constitutional deprivation analysis . . .

Zipperer, 41 F.3d at 624 n.5 (App. A, A11).

By taking such a position, the Eleventh Circuit effectively puts Mr. Zipperer in a "Catch-22." The Eleventh Circuit holds that Mr. Zipperer has no right to have his objections to the assessments and the subordination of his lien heard at the time that the super-priority lien is imposed and also holds that it will not later consider those objections in its analysis of whether or not a constitutional deprivation of Mr. Zipperer's property interest actually occurred. The Eleventh Circuit found no plain, speedy and adequate remedy exists in Florida for Mr. Zipperer to challenge the imposition of special assessment liens. The Eleventh Circuit held Mr. Zipperer has a constitutionally protected property interest in his first mortgage lien but decided that he has neither a pre-deprivation opportunity to be heard regarding his objections to a constitutional impairment of his rights nor an opportunity to later prove such a violation.

Furthermore, the Eleventh Circuit also misinterprets another key holding of this Court in *Mennonite* by mistakenly equating the landowner's interest in the assessed property with the lienholder's interest in his first mortgage lien. Because of this mistaken assumption, the Eleventh Circuit holds that it is "specious" for a mortgage lienholder to challenge the imposition of special assessments when the landowner has requested that the improvements be made.

This reasoning, however, ignores the fact that the landowner's and the mortgage lienholder's interests in the imposition of special assessments are *not* in accord. A first mortgagee's primary interest is in preserving the value of his first mortgage lien. This is why many mortgages, such as Mr. Zipperer's, contain a provision prohibiting impairment of the property by the mortgagor. A landowner's property interest, however, is not affected by whether or not a special assessment lien takes priority over a first mortgage lien. The landowner wants cheap construction financing. This public financing subordinates the prior first mortgage. If the landowner would have financed the construction privately, he would have either been required to get Mr. Zipperer's consent to the subordination of Mr. Zipperer's mortgage to the construction lender or "find" a construction lender who would take a second mortgage.

The risk of a deprivation of the mortgagee's constitutionally protected property right is at its greatest when improvements are requested by the landowner, as they were in this case. The *Mennonite* Court explicitly recognized that notice to a mortgagor was not the equivalent of giving notice to a mortgagee when it stated:

> Neither notice by publication and posting, nor mailed notice to the property owner, are means "such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it."

Mennonite, 462 U.S. at 799 (quoting from *Mullane*, 339 U.S. at 315).

In fact, in spite of the even greater risk of constitutional impairment of a mortgagee's first lien rights which exists when the landowner requests the special assessment, the Eleventh Circuit stated that:

> "[A] mortgagee may not insist that the taxing authority protect it from an imprudent special assessment levied because of the mortgagor's request." and that "if a landowner requests the improvements for which a special assessment is levied by a taxing authority, neither he nor [the mortgagee] may challenge the legislature's ascription of benefit to the landowner." [citations omitted].

Zipperer, 41 F.3d at 625 (App. A, A13, A14).

The above quotation blatantly ignores the fact that what Mr. Zipperer has requested is the right to voice any objections he had to the imposition of these super-priority special assessment liens at a hearing prior to the subordination of Mr. Zipperer's first mortgage to the special assessment liens. Totally foreclosing Mr. Zipperer's right to object to those special assessments, which have been requested by a landowner whose interests are materially different and, indeed, conflicting with Mr. Zipperer's, in order to avoid the assessing authority's "discomfort" with having to listen to objections, is not grounds for denying Mr. Zipperer's constitutional right to notice and an opportunity to be heard.

Finally, the Eleventh Circuit's holding is based upon the mistaken belief that if Mr. Zipperer's constitutionally protected property right was impaired by the super-priority special assessment liens, then Mr. Zipperer would be able:

> "to foreclose on an improved piece of property, ignore the special assessment liens, reap the benefits of the improvements, and not have the responsibility of paying for them."

Zipperer, 41 F.3d at 625 (App. A, A14).

First, if this Court ruled that Mr. Zipperer's first mortgage lien was not subordinated to the City of Fort Myers and Lee County's special assessment liens, then the City and County could easily protect their rights by either paying off Mr. Zipperer's mortgage or by bidding for the property at the reforeclosure sale. In this manner, the City and County, and not Mr. Zipperer, would still be able to reap the true benefits of their "improvements" to the property.

Second, the special assessments did not benefit, if at all, the land to anywhere near the cost of the assessments. Therefore, the City's and County's super-priority special assessment liens will allow them to foreclose upon the property, ignore Mr. Zipperer's first mortgage lien, reap the benefits of owning both the property and the "improvements," and not have the responsibility of paying off Mr. Zipperer's mortgage. As a private citizen, Mr. Zipperer should not be forced to pay such an enormous price for the benefit of the City and County when Mr. Zipperer did not ask for the special assessments and was not even given prior written notice and an opportunity to object to the imposition of the special assessments and the subordination of his first mortgage lien.

II. By granting this Writ, this Court will be able to address an issue not previously addressed on the application of its holding in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983) and this Court's *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) due process analysis to an important question of constitutional local governmental power versus private property rights.

This Court should also grant Mr. Zipperer's Petition for Certiorari so that it can address the important local governmental power versus private rights question of what type of notice of hearing (written or published) a prior recorded first mortgagee is constitutionally entitled to receive prior to the imposition of special assessment liens which purport to subordinate the first mortgage. The Eleventh Circuit did not reach this important issue because it incorrectly held that the subordination of Mr. Zipperer's first mortgage lien was not a constitutional impairment of Mr. Zipperer's property right. This Petition has shown the Eleventh Circuit's decision on the property impairment question should be reversed because it is contrary to both this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), and Florida case law as exemplified by *Sarasota County v. Andrews*, 573 So.2d 113 (Fla. Dist. Ct. App. 2d Dist. 1991).

Therefore, this Court should grant Mr. Zipperer's petition for certiorari so that the Court can decide what type of notice of special assessment and super-priority lien imposition hearings is required to be given to prior-recorded mortgagees. Reaching this issue will enable the Court to conduct a post-*Mullane* due process analysis like the analysis it conducted in *Tulsa Professional Collection*

Services v. Pope, 485 U.S. 478 (1988) (holding that creditors which are reasonably ascertainable are entitled to written notice of probate proceedings which trigger the running of a non-claims statute), balancing the state's interest against the due process interest of Mr. Zipperer. Conducting this analysis will allow the Court to reaffirm the core holding of its decision in *Mennonite*. If a mortgagee's name and address is reasonably ascertainable from the public records, then a mortgagee must be given prior written notice of a proceeding seeking to create a super-priority lien which immediately and substantially impairs the value of that mortgage lien. *Mennonite*, 462 U.S. at 798. Applying this reasoning to the facts of Mr. Zipperer's case, Mr. Zipperer was entitled to prior written notice of the City and County's special assessment and lien prioritization hearings. His name and address were easily ascertainable from the mortgage recorded in the Lee County public records. The City and County's purpose in holding the hearings was to decide whether or not liens would be created which would immediately and substantially impair Mr. Zipperer's constitutionally protected property interest in his first mortgage lien. Clearly, Mr. Zipperer was constitutionally entitled to notice.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant the petition for a Writ of Certiorari to address the Eleventh Circuit's departure from the rationale of this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), to enable the Court to rectify the constitutional injury Mr. Zipperer has suffered, and to address this important issue concerning the constitutional boundary between local government power and individual property rights.

Respectfully submitted,

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APPENDIX

APPENDIX A – January 3, 1995 Eleventh Circuit Decision on the Merits, *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995) A1

APPENDIX B – November 22, 1993 District Court Order Granting Summary Judgment and Accompanying District Court Memorandum of Law B1

APPENDIX C – February 10, 1995 Eleventh Circuit Order Denying Mr. Zipperer's and The City of Fort Myers Motions for Rehearing C1

APPENDIX D – City of Fort Myers Petition for Rehearing D1

APPENDIX E – *Florida Statutes*, Chapter 170 (1993) E1

APPENDIX A

John O. ZIPPERER, Jr., an individual, Plaintiff-Appellant,

v.

CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; Fort Myers City Council, as Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Fort Myers City Council, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; Fort Myers City Council, as the Governing Authority of Improvement District No. 17; Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Improvement District No. 15, Omni Interstate Park; Improvement District No. 17; Lee County, a political subdivision of the State of Florida; Colonial Road Extension Improvement Special District Board, as the Governing Authority of the Defendant Special District known as Colonial Road Extension Improvement Special District; Colonial Road Extension Improvement Special District, Defendants-Appellees.

No. 93-3546.

United States Court of Appeals,
Eleventh Circuit.

Jan. 3, 1995.

Mortgagee brought action against city, county, and districts contained therein to challenge lien priority of special assessments imposed on mortgaged land. The United States District Court for the Middle District of Florida. No. 93-108-CIV-FTM-23D, L. Clure Morton, J.,

granted summary judgment for defendants, and mortgagee appealed. The Court of Appeals, Black, Circuit Judge, held that: (1) Tax Injunction Act did not bar federal court jurisdiction over mortgagee's action; (2) mortgage was constitutionally protected property interest; and (3) imposition and prioritization of special assessment liens on mortgaged land did not deprive mortgagee of his property interest, and, therefore, defendants did not violate mortgagee's due process rights.

Affirmed.

John H. Rains, III, Annis, Mitchell, Cockey, Edwards & Roehn, Tampa, FL, for appellant.

John S. Turner, Lee County Attorney's Office, Fort Myers, FL, for Lee County.

Jacqueline W. Hubbard, City of Fort Myers, City Attorney's Office, Theodore L. Tripp, Jr., Garvin & Tripp, P.A., Fort Myers, FL, for City of Fort Myers.

Kathleen E. Moore, Office of the Atty. Gen., Tallahassee, FL, amicus, State of Fla.

Appeal from the United States District Court for the Middle District of Florida.

Before HATCHETT and BLACK, Circuit Judges, and YOUNG* Senior District Judge.

BLACK, Circuit Judge:

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*Honorable George C. Young, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

John Zipperer, the mortgagee of property located in Fort Myers, Florida, (the mortgaged land) brought this action against the City of Fort Myers (the City), Lee County (the County), and the districts contained therein (the Districts), (collectively, the Appellees) to challenge the lien priority of special assessments imposed on the mortgaged land. Zipperer claims that the prioritization of the special assessment liens over his mortgage violated his due process rights, because the Appellees did not give him actual notice of the imposition of these liens. The Appellees contend that the lien priority given to the special assessments did not deprive Zipperer of any property interest, and therefore, actual notice was not required before imposing and prioritizing the lien on the mortgaged land. The district court found no due process violation, and granted summary judgment in favor of the Appellees. We affirm.

I. *FACTS AND PROCEDURAL HISTORY*

In August 1986, Zipperer loaned $8,900,000 to Gerald DeSimone. The loan was secured by a mortgage in favor of Zipperer on land which DeSimone owned in Fort Myers, Florida. Zipperer promptly recorded the mortgage in the Lee County Official Record Book. Soon after, DeSimone requested that the City of Fort Myers make certain improvements on the mortgaged land, which the City was authorized to do under Florida law.[1]

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[1] Specifically, Chapter 170 of the Florida Statues entitled "Supplemental and Alternative Method of Making Local Municipal Improvements," provides a scheme for local governments

Pursuant to the powers given to it under Florida Statutes § 170, the City passed resolutions to establish Districts within the City, and make improvements in the Districts. The mortgaged land was included in the Districts. According to the resolutions, the following improvements were to be made in the Districts: (1) water and sewer facilities at an estimated cost of $13,000,000; (2) roadways and paving at an estimated cost of $10,900,000; and (3) other public improvements at an estimated cost of

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to provide public improvements and methods of payment for those improvements.

Florida Statutes § 170.01 (1993) provides that a municipality may provide for the construction of public improvements, and "provide for the payment of all or any part of the costs of any such improvements by levying and collecting special assessments on the abutting, adjoining, contiguous, or other specially benefited property."

Florida Statutes § 170.02 states that special assessments should be assessed upon the property benefitted by the improvements in proportion to the benefits derived from the improvements.

Florida Statutes § 170.07 requires that before these improvements or assessments are confirmed, ten days' written notice must be given to all property owners advising them of the proposed imposition of the special assessment liens, the nature and cost of the improvements, and a hearing time and place where the owners could be heard by the municipality regarding these issue. Although the statutes do not require a municipality to give actual notice of the proposed improvements or the hearings to those who are not property owners, it does require that the municipality publish notice of the hearings and proposed improvements. *Id.*

Florida Statutes § 170.09 provides that once confirmed, these special assessments constitute liens on the improved property, which are co-equal with the lien of other taxes and superior to all other liens, titles, and claims until paid.

$6,017,000. After paying for the improvements with government bonds, the City Council levied special assessments on a pro-rata acreage basis on the land located within the Districts and confirmed the assessments as first liens.

Before making the improvements, the City sent written notice to DeSimone advising him of the nature and costs of the proposed improvements, the special assessments, and his opportunity to appear before the City Council to be heard as to any issues concerning the improvements. The City did not directly notify Zipperer of the hearings or improvements, although the information was published in the local newspaper. After the improvements were confirmed, DeSimone failed to pay his pro-rata assessment installment for the improvements on the mortgaged land. In 1989, the City filed a lien on the mortgaged property for the unpaid assessments. Although the City provided DeSimone with actual notice of the filing of the lien and its priority status, it gave no notice to Zipperer.

In April 1990, Zipperer foreclosed on the mortgaged land, and subsequently purchased it. Zipperer then sued the Appellees challenging the lien prioritization of the special assessments on the mortgaged land because the Appellees did not give actual notice of the imposition to Zipperer. He claims that the special assessments and their lien prioritization impaired the value of his property interest without any opportunity to be heard, in violation of the Due Process clause of the Fourteenth Amendment. Zipperer ultimately sought to have the special assessments subordinated in priority to his prior recorded mortgage.

The Appellees filed a motion for summary judgment as to the due process claim, and a motion to dismiss based on jurisdictional grounds. The district court found no violation of due process occurred, and issued an order granting summary judgment in favor of the Appellees. In this appeal, we address at length only the due process issue.[2]

II. *STANDARD OF REVIEW*

We review a grant of summary judgment de novo. *Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1104 (11th Cir. 1990). On review, we apply the same standards that bound the district court on the summary judgment motion below. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir.1990). Any reasonable dispute of material fact must be resolved in favor of the nonmoving party. *Barnes v. Southwest Forest Industries, Inc.*, 814 F.2d 607, 609 (11th Cir.1987).

III. *DISCUSSION*

A. *The Tax Injunction Act*

As a preliminary matter, this court has jurisdiction pursuant to 28 U.S.C. § 1331 as a federal question action arising under the Constitution, and we reject Appellees' contention that the Tax Injunction Act, 28 U.S.C. § 1341, bars federal court jurisdiction. Section § 1341, which deprives federal courts of jurisdiction to enjoin, suspend

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[2] The disposition of the due process issue makes it is unnecessary to reach the other issues raised by the parties on appeal.

or restrain the assessment, levy or collection of any tax under state law except where no plain, speedy and efficient remedy is available in state courts, is inapplicable in the instant case.

First, we note that the Florida Supreme Court has rejected the argument that special assessments are considered taxes under the Florida Constitution. *Boca Raton v. State*, 595 So.2d 25, 29 (Fla.1992) (declaring that "a legally imposed special assessment is not a tax"). Thus, although Appellees cite several provisions under the Florida Constitution and Florida Statutes which afford taxpayers remedies when challenging state taxes[3], these provisions afford no remedies to individuals when challenging special assessments. Consequently, Zipperer has no "plain, speedy and efficient remedy" in the Florida courts.

Second, Zipperer requests that we determine whether a lien prioritization without adequate notice violates constitutionally protected interests of a mortgagee, but he does not request that we "enjoin, suspend or restrain" the collection of any tax. *See Director of Revenue, State of Colorado v. U S.*, 392 F.2d 307, 311 (10th Cir.1968) (holding that the Tax Injunction Act does not bar a federal court

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[3] Florida Constitution, Article V, § 20(c)(3), grants Florida circuit courts jurisdiction to hear challenges to any state tax.

Florida Statutes § 72.011 (1988) and § 86.011 (1987) give Florida circuit courts the power to issue declaratory and injunctive relief in tax cases.

Florida Statutes § 215.26 (1989) gives Florida taxpayers the right to seek a tax refund from the state.

Florida Statutes §§ 194.171-194.231 (1993) provide a scheme to contest the imposition of taxes.

from hearing the case where the only question is one of lien priorities and no one seeks to suspend the collection of state taxes.) For these reasons, this Court has jurisdiction over Zipperer's constitutional due process claim.

B. *Procedural Due Process*

Procedural due process requires notice and an opportunity to be heard before any governmental deprivation of a property interest. *Donaldson v. Clark*, 819 F.2d 1551, 1558 (11th Cir.1987) (en banc) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378-79, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971). Thus, to determine if a procedural due process violation occurred in this case, we must resolve: (1) whether Zipperer had a constitutionally protected property interest; (2) whether he was deprived of that interest; and (3) if he was deprived of a constitutionally protected property interest, whether the Appellees failed to use constitutionally sufficient procedures before that deprivation occurred. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 1908, 104 L.Ed.2d 506 (1989); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33, 102 S.Ct. 1148, 1156, 71 L.Ed.2d 265 (1982).

1. *A Mortgage is a Constitutionally Protected Property Interest.*

Property interests are not created by the Constitution, but are defined by existing rules or understandings that stem from an independent source such as state law. *Board of Regents v. Roth*, 408 U.S. 564, 577-78, 92 S.Ct. 2701,

2709, 33 L.Ed.2d 548 (1972). Florida courts have determined that a mortgage can be a constitutionally protected property right. In *Sarasota County v. Andrews,* 573 So.2d 113 (Fla. 2d DCA 1991), the court found that a county's attempt to assert that a lien created by an ordinance was superior in right to a prior recorded mortgage, was a substantial impairment of the first mortgage lien for federal and state constitutional purposes. *Id.* at 115. Although *Sarasota* was decided under a contract impairment analysis, it nevertheless stands for the proposition that a mortgagee, who is in essence a party to a security contract, has a property right in preservation of its mortgage interest. *See also Mailman Development Corp. v. Segall,* 403 So.2d 1137, 1138 (Fla. 4th DCA 1981) (holding that a "mortgagee should not be required to accept a substituted security interest since a mortgagee lien is a property right. . . . ").

Moreover, Florida law gives a mortgagee the right to foreclose and reforeclose its liens. Fla.Stat. § 697.01 (1993). Therefore, a mortgage is a cause of action creating a lien on property. *See United of Florida, Inc. v. Illini Federal Savings & Loan Association,* 341 So.2d 793, 794 (Fla. 2d DCA 1977). The Supreme Court has specifically held that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982). *See Tulsa Collection Services v. Pope,* 485 U.S. 478, 485-86, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565 (1988). Thus, as a mortgagee, Zipperer has a constitutionally protected property interest in his mortgage.

2. *Appellees Did Not Impair Zipperer's Property Interest*

Having found that Zipperer has a constitutionally protected property interest, we must now decide whether the lien prioritization of the special assessments constitutes a deprivation or impairment of Zipperer's property interest. Zipperer argues that this case is governed by *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), in which the Supreme Court set forth the broad proposition that a mortgagee is entitled to notice reasonably calculated to apprise him or her of a pending tax sale because, under Indiana law, a mortgagee possesses a protected property interest that is adversely affected by a tax sale. In so ruling, the Court reasoned that "[t]he tax sale *immediately and drastically diminishes* the value of the security interest by granting the tax-sale purchaser a lien with priority over that of all other creditors." *Id.* at 798, 103 S.Ct. at 2711 (emphasis added).[4] The Court accordingly held that a state may not conduct a tax sale of property without mailing notice to any interest holder, such as a mortgagee, who is reasonably identifiable in the public records. *Id.*

We agree that had there been a tax sale of the mortgaged property which nullified Zipperer's entire interest as mortgagee, Zipperer's interest would have been as

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[4] Likewise, Florida courts have found a constitutional impairment where the alleged deprivation causes "immediate diminishment" in the value of the interest, or where the interest would be entirely eliminated. *Sarasota County v. Andrews*, 573 So.2d 113, 115 (Fla. 2d DCA 1991).

"immediately and drastically diminished" as the mortgagee's interest in *Mennonite*. It is uncontroverted, however, that Zipperer, as the present landowner, will retain a significant interest in the land even after its subordination to the special assessment. Therefore, the imposition of the special assessments and their lien prioritization do not immediately and drastically diminish his interests in a manner that would implicate a *Mennonite* due process deprivation.

Since the *Mennonite*, decision, neither the Supreme Court nor this Circuit have addressed whether the imposition and prioritization of special assessments on mortgaged land, as opposed to a tax sale of mortgaged land, constitute a deprivation. However, the Fifth Circuit has held in a factually similar case that the imposition of special assessments and their lien prioritization do not constitutionally impair or deprive a mortgagee of his interest in mortgaged land. *Federal Deposit Ins. Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir.1991).[5]

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[5] In *New Iberia*, assessments were based on the proportion of land abutting the proposed improvements. *Id.* at 612. In the instant case, assessments were made based on acreage within the districts. At oral argument, Zipperer maintained that the different assessment methods were a fundamental distinction between the two cases, because Zipperer's costs in relation to his benefits were higher than those of the mortgagee in *New Iberia*. However, the manner in which a municipality chooses to assess the costs and benefits of public improvements is discretionary under Florida law. *See* Fla.Stat. § 170.02 (1993). We find it inappropriate to scrutinize the exact costs and benefits of municipal improvements in a constitutional deprivation analysis and, therefore, this distinction has no bearing on the outcome of the case. *See New Iberia*, 921 F.2d at 614 (stating that the

The *New Iberia* court emphasized that "local tax assessments would not contravene the Fourteenth Amendment unless they amounted to such an abuse as to be an outright confiscation of property." *Id.* at 615 (*citing French v. Barbar Asphalt Paving Co.*, 181 U.S. 324, 21 S.Ct. 625, 45 L.Ed. 879 (1901)). The court distinguished *Mennonite*, reasoning that *Mennonite* in no way suggested that a taxing authority's decision to levy special assessments and give them priority over other liens affects a mortgagee in the same way that a tax sale does.[6] *New Iberia*, 921 F.2d at 614. Likewise, in the instant case the government did not confiscate property; it simply imposed liens on Zipperer's property for improvements which it had already made and paid for with government bonds.

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parties' emphasis on precise measurement of the costs and benefits of the municipal improvements misplaces the focus of a constitutional analysis).

[6] Application of the *Mennonite* decision has also been narrowed by the Eleventh Circuit in *FDIC v. Morrison*, 747 F.2d 610 (11th Cir.1984), *cert. denied*, 474 U.S. 1019, 106 S.Ct. 568, 88 L.Ed.2d 553 (1985). In *Morrison*, this Court held that under Alabama law, a mortgagor suffers no constitutionally protected property deprivation when the mortgagee, using Alabama statutory procedures, foreclosed within the contractual terms of the mortgage. *Id.* at 616. The Court observed that the mortgagor lost nothing by the mere fact that the foreclosing mortgagee acted in observance of its congressionally mandated purpose and, therefore, suffered no deprivation. *Id.* In so observing, the Court noted that "*Mennonite*, which construes a mortgagee's rights in a tax sale under Indiana law, offers us little guidance in construing a mortgagor's rights in a contractual foreclosure sale under Alabama law." *Id.* Likewise, we are not bound by the *Mennonite* decision in construing a mortgagee's rights with respect to special assessments levied on improved land which the mortgagee now owns.

The court in *New Iberia* also found it specious to challenge the imposition of the special assessments where the mortgagor itself requested that the city aid in making these improvements. The court stated:

> To allow the mortgagee to assert an unconstitutional taking because of a special assessment sought by the landowner would allow the mortgagee potentially to receive whatever benefit did result from the improvements without having to pay for them. Moreover, this claim by the mortgagee would place an impossible, if not absurd, burden upon the taxing authority: to police the landowner's requests for assistance with improvements so that his mortgagee will not be discomfited by ensuing special assessments. [The mortgagee's] implicit plea for governmental paternalism in an area normally controlled by sophisticated contractual relationships is as strange as it is unsupported by precedent.

Id. at 615-616.

In the instant case, as in *New Iberia*, the original landowner of the mortgaged land requested the improvements, and the present owner of that same land now reaps the benefits of these requested improvements. On this point, we agree with the Fifth Circuit that "a mortgagee may not insist that the taxing authority protect it from an imprudent special assessment levied because of the mortgagor's request," *id.* at 616, and that "if a landowner requests the improvements for which a special assessment is levied by a taxing authority, neither he nor [the mortgagee] may challenge the legislature's ascription

of benefit to the landowner." *Id.* Rather, a special assessment lien prioritization constitutes a constitutional deprivation only if it is so palpably punitive or arbitrary as to confer no benefit on the landowner, or 'force[s] a landowner to make an improvement that, while valuable to others, is useless to him.' *Id.* (*quoting Furey v. City of Sacramento*, 780 F.2d 1448, 1454 (9th Cir. 1986)).

Here, it is uncontroverted that Zipperer is the owner of the subject property. It is also uncontroverted that as a result of the Appellees' actions, the property now has water and sewage facilities, roadways and paving, and other valuable improvements, all of which are far from "useless" to Zipperer. Zipperer's property has obviously benefited from the improvements made and paid for by the Appellees. Therefore, we hold that the Appellees' imposition and prioritization of special assessment liens on the mortgaged land did not deprive Zipperer of his interest as a mortgagee. Any other holding would allow Zipperer to foreclose on an improved piece of property, ignore the special assessment liens, reap the benefits of the improvements, and not have the responsibility of paying for them. Due process does not protect such interests.[7]

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[7] Because there is no constitutional due process issue, it is unnecessary for us to decide whether the City's notice procedure was adequate.

IV. *CONCLUSION*

We hold that the Appellees' imposition and prioritization of the special assessment liens on the mortgaged land do not deprive Zipperer of his property interest as a mortgagee. Therefore, the Appellees did not violate Zipperer's constitutional due process rights and the district court's opinion is:

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JOHN O. ZIPPERER, JR.)
) NO. 93-108-CIV-FTM-23
VS.)
CITY OF FORT MYERS et al.)

ORDER
(Filed Nov. 22, 1993)

In accordance with the memorandum contemporaneously filed, the defendant's motion for summary judgment is hereby granted and this case is dismissed.

It is so ORDERED.

/s/ L. Clure Morton
L. CLURE MORTON
SENIOR U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JOHN O. ZIPPERER, JR.	)	
VS.	)	NO. 93-108-CIV-FTM-23
CITY OF FORT MYERS et al.	)	

MEMORANDUM

On or before August 14, 1986, Gerald DeSimone, Trustee, owned certain real estate located in Fort Myers, Lee County, Florida. On August 14, 1986, this property was mortgaged to John O. Zipperer, Jr. Thereafter, DeSimone petitioned the City of Fort Myers to establish improvement districts to include the DeSimone property. These districts were created and special assessments were made against the property located within their boundaries. These assessments were not paid. The mortgage dated August 14, 1986, was foreclosed and title vested in John O. Zipperer, Jr., on January 23, 1992. Plaintiff John O. Zipperer, Jr., asserts that his mortgage has priority over the liens of the improvement district because the improvement district did not give him personal notice of the liens. In effect, he is asserting that the priority status of the improvement district's liens constitutes a taking or condemnation of the property interest represented by his mortgage.

Motions to dismiss in this case have been filed and certain facts have been stipulated.

In *Federal Deposit Insurance Corp. v. Morrison*, 747 F.2d 610 (11th Cir. 1984), the court distinguished the facts of

that case from *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), and put to rest the theory of the plaintiff now at bar.

The plaintiff asserts that he was not afforded due process as to the imposition of the respective liens. Assuming arguendo that the holding in *Federal Deposit Insurance Corp. v. City of New Iberia*. 921 F.2d 610 (5th Cir. 1991), did not answer this question (although the court holds that it did) procedural due process requires an opportunity to be heard either pre- or post-action. In this type of case the State of Florida gives the plaintiff ample opportunity to litigate this question. For instance, the plaintiff has instituted a "second foreclosure" action under state law in the very state court which will determine the lien priority. There are other post-action remedies as well. Therefore the plaintiff has had and continues to have adequate procedural due process.

For the foregoing reasons, the defendant's motion to dismiss, treated as a motion for summary judgment, will be granted.

An appropriate order will be entered.

/s/ L. Clure Morton
L. CLURE MORTON
SENIOR U.S. DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-3546

JOHN O. ZIPPERER, JR., an individual,

Plaintiff-Appellant,

versus

CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependant Special District know as Colonial Road Extension; IMPROVEMENT SPECIAL DISTRICT; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING
(Filed Feb. 10, 1995)

BEFORE: HATCHETT, BLACK, Circuit Judges and YOUNG*, Senior District Judge.

PER CURIAM:

The petition for rehearing filed by appellant John O. Zipperer, Jr. is denied.

The petition for rehearing filed by appellee City of Fort Myers, et al. is denied.

ENTERED FOR THE COURT:

/s/ Susan H. Black
United States Circuit Judge

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* Honorable George C. Young, Senior U. S. District Judge for the Middle District of Florida, sitting by designation.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN O. ZIPPERER, JR.,
an individual,

Plaintiff/Appellant,

vs. Case No. 93-3546

THE CITY OF FORT MYERS,
LEE COUNTY, et al.,

Defendants/Appellees.
_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA
CASE NO. 93-108-CIV-FTM-23
L. CLURE MORTON, VISITING JUDGE

PETITION FOR REHEARING

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STATEMENT OF THE ISSUES

1. The Court has made no express determination regarding whether a Chapter 170 assessment is a tax under Federal law.

2. A Chapter 170 assessment can be challenged through plain, speedy, and efficient remedies in State Court.

STATEMENT OF THE CASE

The City of Fort Myers does not dispute the holdings of the United States Court of Appeals for the Eleventh Circuit as they pertain to the findings of law except to the extent of its determination in Part III A of its decision. Therein, the Court states that Appellant, Zipperer, has no plain, speedy, and efficient remedy in Florida courts.

Additionally, it is unclear to the Appellee if the Court seeks to apply its ruling to the narrow set of facts peculiar to the instant case, (which involves a prior foreclosure of a mortgage, subsequently returning the property to the mortgagee with a special assessment lien having a first priority over the mortgage). Although this Court has held that the Tax Injunction Act, 28 U.S.C. Section 1341, does not bar a Federal court from hearing a case where the only question is one of lien priorities, the Court further states that the Tax Injunction Act also does not apply because the Florida Constitution affords no remedies to individuals challenging special assessments. The Court has not ruled on the issue of whether a special assessment is a tax under Federal law. Appellee is therefore requesting the Court re-examine its analysis of these issues and clarify its position regarding these points.

ARGUMENTS FOR REHEARING

I.

THE COURT HAS MADE NO EXPRESS DETERMINATION REGARDING WHETHER A CHAPTER 170 ASSESSMENT IS A TAX UNDER FEDERAL LAW FOR PURPOSES OF THE TAX INJUNCTION ACT

The Court did not expressly determine in its opinion whether a special assessment enacted pursuant to *Florida Statutes*, Chapter 170, is a tax for purposes of the Tax Injunction Act, 28 U.S.C. Section 1341. However, because the Court rendered an analysis that discussed whether the Appellant was seeking to enjoin, suspend, or restrain the collection of a tax, it can be argued that the Court so held. Further clarification on this issue is requested to avoid the interpretation that the Eleventh Circuit Court of

Appeals is relying upon the Florida Supreme Court's opinion in *Boca Raton v. State,* 595 So.2d 25 (Fla. 1992) for a definition of what constitutes a tax for purposes of the Act.

Federal law normally controls the determination of this issue. The Court in *Robinson Protective Alarm Company v. City of Philadelphia,* 581 F.2d 371 (3d Cir. 1978), clearly states that under 28 U.S.C. Section 1341 the definition of what constitutes a tax is the definition held by the Federal Courts. Under the analysis in *Robinson,* the special assessments which the City has imposed in this case would be a "tax" for purposes of 28 U.S.C. Section 1341.

Tramel v. Schrader, 505 F.2d 1310 (5th Cir. 1975), was a suit to enjoin the collection of special assessments for street improvements in a City in Texas. The Plaintiff in *Tramel, Id.* argued that the tax injunction statute was inapplicable because a special assessment is not a tax. The Court held that the definition of what constitutes a "tax" for purposes of this statute is controlled by federal law, and that a special assessment was indeed a tax. One of the major reasons it so held was because a special assessment is a general revenue generating measure used by a city to construct public improvements. In *Williams v. City of Dothan, Alabama,* 745 F.2d 1406 (11th Cir. 1984), this Court reiterated the notion that a special street improvement assessment was a tax for the purpose of the Tax Injunction Act. In *Williams,* it was held that the "basic inquiry" is whether state law provides "a plain, speedy, and efficient way for the taxpayer to press its constitutional claims while preserving the right to challenge the amount of tax due", at Page 1412. Other Courts have

similarly held, for instance, in *Lake Lansing Protest Association v. Ingham Board of Commissioners,* 488 F.Supp. 767, (U.S. Dist. W.D. MI 1980), the Court stated, referring to *Tramel, supra*:

> "The initial question, thus presented, is whether the term "tax" as used in Section 1341 includes a special assessment levied by a municipal corporation. In *Tramel,* (citation deleted), the Court considered whether 28 U.S.C. Section 1341 barred a suit to enjoin the collection of special street assessments which were alleged to be violative of the plaintiff's federal constitutional rights. While Texas state courts had defined these special assessments as something other than "taxes", the Court in *Tramel* denied any controlling effects to the state court's distinction between taxes and special assessments . . . At Page 772.

II.

A CHAPTER 170 ASSESSMENT CAN BE CHALLENGED THROUGH PLAIN, SPEEDY, AND EFFICIENT REMEDIES IN STATE COURT

It also should be noted that the Appellant has not alleged in his complaint that he has no adequate state remedy. In *Colonial Pipeline Company v. Collins,* 921 F.2d 1237, a 1991 Eleventh Circuit case, cited by the Court in its Zipperer opinion holds that absent a showing by a complainant that State law does not provide sufficient remedy for his or her constitutional claims, the Federal District Court lacks jurisdiction to entertain a challenge to the State scheme of taxation under the Tax Injunction Act.

There are at least six instances in which the Appellant has an adequate state remedy:

First, the Appellant has a right to reopen his foreclosure suit in the State Court that he filed originally against the developer to bring in what he considers a junior lien holder, which could be the City of Fort Myers. In fact, the Appellant has already filed in State Court a motion for relief from judgment that has never been ruled on. So technically, his State Court foreclosure action is still pending, because the Court has never ruled on his motion.

Second, Appellant has a right to declaratory relief in State Court on this very issue, which he has never moved for. *Mlecka v. Citrus County*, 610 So.2d 677, (Fla. App. 5 Dist. 1992); *Dawson v. Childs*, 665 F.2d 705 (5th Cir. Unit A, January 14, 1984).

Third, as he stated in his Complaint, his contract for the mortgage with the developer had a provision in that contract that said that the developer will not cause any kind of lien or incumbrance to occur on that property. Therefore, he has a breach of contract action against the developer.

Fourth, the Appellant can file an action to quiet title and have the State Court decide the priority of the City's lien, as opposed to his mortgage lien.

Fifth, if all of the other five remedies fail, the Appellant also has a right to injunctive relief under state statutory law. Mr. Zipperer can clearly challenge both the amount and the methodology of the assessment in a state

court action for injunctive relief. *Steinberg v. City of Sunrise*, 592 So.2d 1148, (Fla. App. 4th Dist. 1992). In fact, in the *City of Sunrise* case, the Florida State Appellate Court clearly held that there were remedies available to an aggrieved property owner in a special assessment dispute regardless of a determination of his status as taxpayer.

Sixth, the Appellant has the ability to challenge the foreclosure of the City special assessment lien under a 42 U.S.C. Section 1983 action, which he has filed in Federal Court, he can do the same thing in State Court. The State of Florida permits Section 1983 litigation. *Tucker v. Resha*, 19 Fla. L. W. S5570 (1994); *Brooks v. Elliott*, 593 So.2d 1209 (Fla. 2d DCA 1992), and this Court expressly was told that the availability of this remedy must be considered. *Colonial Pipeline v. Collins*, 921 F.2d 1237 (11th Cir. 1991).

In *Winicki v. Mallard*, 645 F.Supp. 1244 (U. S. Dist. Ct. Middle Dist. Fla. 1985), the Court held that the plaintiff has the burden of demonstrating that he has no adequate state remedy. The Court further held that if he has an adequate state remedy for his claim, then the case should be sent back to Federal Court or at least dismissed out of Federal Court and the plaintiff should seek his adequate state remedy.

CONCLUSION

Although this Court has noted that the Florida Supreme Court rejected the argument that special assessments are considered taxes under the Florida Constitution, the Court should clarify its opinion regarding whether a special assessment is a tax for purposes of the Tax Injunction Act. The Court also should hold that the

Appellant does have a plain, speedy and efficient remedy in the State courts and that because this action challenges the lien that secures payment of the assessment at issue, federal courts have no subject matter jurisdiction over the claim.

Respectfully submitted,

CITY OF FORT MYERS

By: /s/ Jacqueline Williams Hubbard
Jacqueline Williams Hubbard
City Attorney
City of Fort Myers
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(813) 332-6707
Florida Bar No. 468126

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 23rd day of January, 1995 to John H. Rains, III, Esq., Annis, Mitchell, Cockey, Edwards & Roehn, Suite 2100, One Tampa City Center, P.O. Box 3433, Tampa, Florida 33601, John Turner, Esq., Lee County Attorney's Office, Post Office Box 398, Fort Myers, Florida 33902, Kathleen E. Moore, Esq., Assistant Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050, and Theodore L. Tripp, Esq., Garvin & Tripp, Post Office Box 2040, Fort Myers, Florida 33902.

/s/ Jacqueline Williams Hubbard
Jacqueline Williams Hubbard

APPENDIX E

FLORIDA STATUTES (1993)

CHAPTER 170

SUPPLEMENTAL AND ALTERNATIVE METHOD OF MAKING LOCAL MUNICIPAL IMPROVEMENTS

170.01 Authority for providing improvements and levying and collecting special assessments against property benefited.

170.02 Method of prorating special assessments.

170.03 Resolution required to declare special assessments.

170.04 Plans and specifications, with estimated cost of proposed improvement required before adoption of resolution.

170.05 Publication of resolution.

170.06 Preliminary assessment roll.

170.07 Publication of preliminary assessment roll.

170.08 Final consideration of special assessments; equalizing board to hear complaints and adjust assessments; rebate of difference in cost and assessment.

170.09 Priority of lien; interest; and method of payment.

170.10 Legal proceedings instituted upon failure of property owner to pay special assessment or interest when due; foreclosure; service of process.

170.11 Bonds may be issued to an amount not exceeding the amount of liens assessed for the cost of improvements to be paid by special assessment.

170.14 Governing authority of municipality required to make new assessments until valid assessment is

made if special assessment is omitted or held invalid.

170.15 Expenditures for improvements.

170.16 Assessment roll sufficient evidence of assessment and other proceedings of this chapter; variance not material unless party objecting materially injured thereby.

170.17 Denomination of bonds; interest; place of payment; form; signatures; coupons; and delivery.

170.18 Notice required where no newspaper is published in county in which municipality is situated.

170.19 Construction and authority of chapter.

170.20 Bonds negotiable.

170.21 Provisions of chapter supplemental, additional, and alternative procedure.

170.01 Authority for providing improvements and levying and collecting special assessments against property benefited. –

(1) Any municipality of this state may, by its governing authority:

(a) Provide for the construction, reconstruction, repair, paving, repaving, hard surfacing, rehard surfacing, widening, guttering, and draining of street, boulevards, and alleys; for grading, regrading, leveling, laying, relaying, paving, repaving, hard surfacing, and rehard surfacing of sidewalks; for constructing or reconstructing permanent pedestrian canopies over public sidewalks; and in connection with any of the foregoing, provide related lighting, landscaping, street furniture, signage,

and other amenities as determined by the governing authority of the municipality;

(b) Order the construction, reconstruction, repair, renovation, excavation, grading, stabilization, and upgrading of greenbelts, swales, culverts, sanitary sewers, storm sewers, outfalls, canals, primary, secondary, and tertiary drains, water bodies, marshlands, and natural areas, all or part of a comprehensive stormwater management system, including the necessary appurtenances and structures thereto and including, but not limited to, dams, weirs, and pumps;

(c) Order the construction or reconstruction of water mains, water laterals, and other water distribution facilities, including the necessary appurtenances thereto;

(d) Provide for the construction or reconstruction of parks and other public recreational facilities and improvements, including appurtenances thereto;

(e) Provide for the construction or reconstruction of seawalls;

(f) Provide for the drainage and reclamation of wet, low, or overflowed lands;

(g) Provide for offstreet parking facilities, parking garages, or similar facilities;

(h) Provide for mass transportation systems;

(i) Provide for improvements to permit the passage and navigation of watercraft; and

(j) Provide for the payment of all or any part of the costs of any such improvements by levying and collecting

special assessments on the abutting, adjoining, contiguous, or other specially benefited property.

However, offstreet parking facilities, parking garages, or other similar facilities and mass transportation systems must be approved by vote of a majority of the affected property owners. Any municipality which is legally obligated for providing capital improvements for water or sewer facilities within an unincorporated area of the county may recover the costs of the capital improvements by levying and collecting special assessments for the purposes authorized in this section on the specially benefited property; however, collections of the special assessment shall not take place until the specially benefited property connects to the capital improvement.

(2) Special assessments may be levied only for the purposes enumerated in this section and shall be levied only on benefited real property at a rate of assessment based on the special benefit accruing to such property from such improvements when the improvements funded by the special assessment provide a benefit which is different in type or degree from benefits provided to the community as a whole.

(3) Any municipality, subject to the approval of a majority of the affected property owners, may levy and collect special assessments against property benefited for the purpose of stabilizing and improving:

(a) Retail business districts,

(b) Wholesale business districts, or

(c) Nationally recognized historic districts,

or any combination of such districts, through promotion, management, marketing, and other similar services in such districts of the municipality. This subsection does not authorize a municipality to use bond proceeds to fund ongoing operations of these districts.

History. – s. 1, ch. 9298, 1923; CGL 3022; s. 1, ch. 67-552 s. 1 ch. 78-360; s. 32, ch. 79-164; s. 1, ch. 82-198; s. 32 ch. 83-204; s. 1, ch. 83-337; s. 1, ch. 87-103; s. 39, ch. 91-45; s. 1 ch. 92-156.

170.02 Method of prorating special assessments. Special assessments against property deemed to be benefited by local improvements, as provided for in s. 170.01, shall be assessed upon the property specially benefited by the improvement in proportion to the benefits to be derived therefrom, said special benefits to be determined and prorated according to the foot frontage of the respective properties specially benefited by said improvement, or by such other method as the governing body of the municipality may prescribe.

History. – s. 2, ch. 9298, 1923; CGL 3023.

170.03 Resolution required to declare special assessments. – When the governing authority of any municipality may determine to make any public improvement authorized by s. 170.01 and defray the whole or any part of the expense thereof by special assessments, said governing authority shall so declare by resolution stating the nature of the proposed improvement, designating the street or streets or sidewalks to be so improved, the location of said sanitary sewers, storm sewers, and drains, the location of said water mains, water laterals, and other water distribution facilities, the location of the

recreational facilities, the location of the seawalls, the location of the drainage project, or the location of the retail or wholesale business districts or nationally recognized historic districts to be improved, and the part or portion of the expense thereof to be paid by special assessments, the manner in which said assessments shall be made, when said assessments are to paid, what part, if any, shall be apportioned to be paid from the general improvement fund of the municipality; and said resolution shall also designate the lands upon which the special assessments shall be levied, and in describing said lands it shall be sufficient to describe them as "all lots and lands adjoining and contiguous or bounding and abutting upon such improvements or specially benefited thereby and further designated by the assessment plat hereinafter provided for." Such resolution shall also state the total estimated cost of the improvement. Such estimated cost may include the cost of construction or reconstruction, the cost of all labor and materials, the cost of all lands, property, rights, easements, and franchises acquired, financing charges, interest prior to and during construction and for 1 year after completion of construction, discount on the sale of special assessment bonds, cost of plans and specifications, surveys of estimates of costs and of revenues, cost of engineering and legal services, and all other expenses necessary or incident to determining the feasibility or practicability of such construction or reconstruction, administrative expense, and such other expense as may be necessary or incident to the financing herein authorized.

History. – s. 3, ch. 9298, 1923; CGL 3024; s. 2, ch. 59-396; s. 2, ch. 67-552; s. 1, ch. 78-330; s. 2, ch. 87-103; s. 40, ch. 91-45; s. 2, ch. 92-156.

170.04 Plans and specifications, with estimated cost of proposed improvement required before adoption of resolution. – At the time of the adoption of the resolution provided for in s. 170.03, there shall be on file with the town or city clerk, or like officer, of the municipality adopting said resolution, an assessment plat showing the area to be assessed, with plans and specifications, and an estimate of the cost of the proposed improvement, which assessment plat, plans and specifications and estimate shall be open to the inspection of the public.

History. – s. 4, ch. 9298, 1923; CGL 3025; s. 3, ch. 59-396.

170.05 Publication of resolution. – Upon the adoption of the resolution provided for in s. 170.03, the municipality shall cause said resolution to be published one time in a newspaper of general circulation published in said municipality, and if there be no newspaper published in said municipality, the governing authority of said municipality shall cause said resolution to be published once a week for a period of 2 weeks in a newspaper of general circulation published in the county in which said municipality is located.

History. – s. 5, ch. 9298, 1923; CGL 3026.

170.06 Preliminary assessment roll. – Upon the adoption of the resolution aforesaid, the governing authority of the municipality shall cause to be made a preliminary assessment roll in accordance with the

method of assessment provided for in said resolution, which assessment roll shall be completed as promptly as possible; said assessment roll shall show the lots and lands assessed and the amount of the benefit to and the assessment against each lot or parcel of land, and, if said assessment is to be paid in installments, the number of annual installments in which the assessment is divided shall also be entered and shown upon said assessment roll.

History. – s. 6, ch. 9298, 1923; CGL 3027; s. 3, ch. 67-552; s. 4, ch. 87-103.

170.07 Publication of preliminary assessment roll. Upon the completion of said preliminary assessment roll, the governing authority of the municipality shall by resolution fix a time and place at which the owners of the property to be assessed or any other persons interested therein may appear before said governing authority and be heard as to the propriety and advisability of making such improvements, as to the cost thereof, as to the manner of payment therefor, and as to the amount thereof to be assessed against each property so improved. Ten days' notice in writing of such time and place shall be given to such property owners. The notice shall include the amount of the assessment and shall be served by mailing a copy to each of such property owners at his last known address, the names and addresses of such property owners to be obtained from the records of the property appraiser or from such other sources as the city or town clerk or engineer deems reliable, proof of such mailing to be made by the affidavit of the clerk or deputy clerk of said municipality, or by the engineer, said proof to be filed with the clerk; provided; that failure to mail

said notice or notices shall not invalidate any of the proceedings hereunder. Notice of the time and place of such hearing shall also be given by two publications a week apart in a newspaper of general circulation in said municipality, and if there be no newspaper published in said municipality the governing authority of said municipality shall cause said notice to be published in like manner in a newspaper of general circulation published in the county in which said municipality is located; provided that the last publication shall be at least 1 week prior to the date of the hearing. Said notice shall describe the streets or other areas to be improved and advise all persons interested that the description of each property to be assessed and the amount to be assessed to each piece or parcel of property may be ascertained at the office of the clerk of the municipality. Such service by publication shall be verified by the affidavit of the publisher and filed with the clerk of said municipality.

History. – s. 7, ch. 9298, 1923; CGL 3028; s. 4, ch. 58-396; s. 1, ch. 77-102; s. 5, ch. 87-103.

170.08 Final consideration of special assessments; equalizing board to hear complaints and adjust assessments; rebate of difference in cost and assessment. – At the time and place named in the notice provided for in s. 170.07, the governing authority of the municipality shall meet and hear testimony from affected property owners as to the propriety and advisability of making the improvements and funding them with special assessments on property. Following the testimony, the governing authority of the municipality shall make a final decision on whether to levy the special assessments. Thereafter, the governing authority shall meet as an

equalizing board to hear and consider any and all complaints as to the special assessments and shall adjust and equalize the assessments on a basis of justice and right. When so equalized and approved by resolution or ordinance of the governing authority, a final assessment roll shall be filed with the governing authority of the municipality, and such assessments shall stand confirmed and remain legal, valid, and binding first liens upon the property against which such assessments are made until paid; however, upon completion of the improvement, the municipality shall credit to each of the assessments the difference in the assessment as originally made, approved, and confirmed and the proportionate part of the actual cost of the improvement to be paid by special assessments as finally determined upon the completion of the improvement, but in no event shall the final assessments exceed the amount of benefits originally assessed. Promptly after such confirmation, the assessments shall be recorded by the city clerk in a special book, to be known as the "Improvement Lien Book," and the record of the lien in this book shall constitute prima facie evidence of its validity. The governing authority of the municipality may by resolution grant a discount equal to all or a part of the payee's proportionate share of the cost of the project consisting of bond financing costs, such as capitalized interest, funded reserves, and bond discount included in the estimated cost of the project, upon payment in full of any assessment during such period prior to the time such financing costs are incurred as may be specified by the governing authority.

History. – s. 8, ch. 9298, 1923; CGL 3029; s. 5, ch. 59-398; s. 1, ch. 78-330; s. 73, ch. 81-259; s. 6, ch. 87-103.

170.09 Priority of lien; interest; and method of payment. – The special assessments shall be payable at the time and in the manner stipulated in the resolution providing for the improvement; shall remain liens, coequal with the lien of all state, county, district, and municipal taxes, superior in dignity to all other liens, titles, and claims, until paid; shall bear interest, at a rate not to exceed 8 percent per year, or, if bonds are issued pursuant to this chapter, at a rate not to exceed 1 percent above the rate of interest at which the improvement bonds authorized pursuant to this chapter and used for the improvement are sold, from the date of the acceptance of the improvement; and may, by the resolution aforesaid and only for capital outlay projects, be made payable in equal installments over a period not to exceed 20 years, to which, if not paid when due, there shall be added a penalty at the rate of 1 percent per month, until paid. However, the assessments may be paid without interest any time within 30 days after the improvement is completed and a resolution accepting the same has been adopted by the governing authority.

History. – s. 6, ch. 9298, 1923; CGL 3030; s. 6, ch. 59-396; s. 1, ch. 61-349; s. 4, ch. 67-552; s. 3, ch. 80-318; s. 74, ch. 81-259; s. 5, ch. 82-195; s. 2, ch. 82-198; s. 33, ch. 83-204.

170.10 Legal proceedings instituted upon failure of property owner to pay special assessment or interest when due; foreclosure; service of process. – Each annual installment provided for in s. 170.09 shall be paid upon the dates specified in said resolution, with interest upon all deferred payments, until the entire amount of said assessment has been paid, and upon the failure of any

property owner to pay any annual installment due, or any part thereof, or any annual interest upon deferred payments, the governing authority of the municipality shall cause to be brought the necessary legal proceedings by a bill in chancery to enforce payment thereof with all accrued interest and penalties, together with all legal costs incurred, including a reasonable solicitor's fee, to be assessed as part of the costs and in the event of default in the payment of any installment of an assessment, or any accrued interest on said assessment, the whole assessment, with the interest and penalties thereon, shall immediately become due and payable and subject to foreclosure. In the foreclosure of any special assessment service of process against unknown or nonresident defendants may be had by publication, as now provided by law in other chancery suits. The foreclosure proceedings shall be prosecuted to a sale and conveyance of the property involved in said proceedings as now provided by law in suits to foreclose mortgages; or, in the alternative, said proceeding may be instituted and prosecuted under chapter 173.

History. – s. 10, ch. 9298, 1923; CGL 3031; s. 7, ch. 59-396.

170.11 Bonds may be issued to an amount not exceeding the amount of liens assessed for the cost of improvements to be paid by special assessment. – After the equalization, approval and confirmation of the levying of the special assessments for improvements as provided by s. 170.06 and as soon as a contract for said improvement has been finally let, the governing authority of the municipality may by resolution or ordinance authorize the issuance of bonds, to be designated

"improvement bonds, series No. ___," in an amount not in excess of the aggregate amount of said liens levied for such improvements. Said bonds shall be payable from a special and separate fund, to be known as the "improvement fund, series No. ___," which shall be used solely for the payment of the principal and interest of said "improvement bonds, series No. ___" and for no other purpose. Said fund shall be deposited in a separate bank account; and all the proceeds collected by the city from the principal, interest, and penalties of said liens shall be deposited and held in said fund. Said bonds so issued shall never exceed the amount of liens assessed, and said bonds shall mature not later than 2 years after the maturity of the last installment of said liens. Said bonds shall bear certificates signed by the clerk of the municipality certifying that the amount of liens levied, the proceeds of which are pledged to the payment of said bonds, are equal to the amount of the bonds issued. The bonds may be delivered to the contractor in payment for his work or may be sold at public or private sale for not less than 95 percent of par and accrued interest, the proceeds to be used in paying for the cost of the work. Said bonds shall not be a general obligation of the city, but shall be payable solely out of said assessments, installments, interest,[1] penalties, provided that said bonds may be secured by any other revenues that may be legally available for such purpose. Any surplus remaining after payment of all bonds and interest thereon shall revert to the city and be used for any municipal purpose. Bonds issued under this

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[1] The word "and" preceding the word "penalties" was stricken by s. 3, ch. 82-156. See Journal of the Senate 1992, p. 705.

section may be refunded from time to time as provided in this section.

History. – s. 11, ch. 9298, 1923; CGL 3032; s. 8, ch. 59-396; s. 5, ch. 67-552; s. 1, ch. 78-330; s. 3, ch. 92-156.

170.14 Governing authority of municipality required to make new assessments until valid assessment is made if special assessment is omitted or held invalid. – If any special assessment made under the provisions of this chapter to defray the whole or any part of the expense of any said improvement shall be either in whole or in part annulled, vacated or set aside by the judgment of any court, or if the governing authority of any municipality shall be satisfied that any such assessment is so irregular or defective that the same cannot be enforced or collected, or if the governing authority of a municipality shall have omitted to make such assessment when it might have done so, the governing authority of the municipality shall take all necessary steps to cause a new assessment to be made for the whole or any part of any improvement or against any property benefited by any improvement, following as nearly as may be the provisions of this chapter and in case such second assessment shall be annulled, said governing authority of any municipality may obtain and make other assessments until a valid assessment shall be made.

History. – s. 14, ch. 9298, 1923; CGL 3035; s. 11, ch. 56-396.

170.15 Expenditures for improvements. – The governing authority of any municipality may pay out of its general funds or out of any special fund that may be

provided for that purpose such portion of the cost of any improvement as it may deem proper.

History. – s. 15, ch. 9298, 1923; CGL 3036; s. 12, ch. 59-396.

170.16 Assessment roll sufficient evidence of assessment and other proceedings of this chapter; variance not material unless party objecting materially injured thereby. – Any informality or irregularity in the proceedings in connection with the levy of any special assessment under the provisions of this chapter shall not affect the validity of the special assessment where the assessment roll has been confirmed by the governing authority. The assessment roll as finally approved and confirmed shall be competent and sufficient evidence that the assessment was duly levied, that the assessment was duly made and adopted, and that all other proceedings adequate to the adoption of the assessment roll were duly had, taken, and performed as required by this chapter, and no variance from the directions hereunder shall be held material unless it be clearly shown that the party objecting was materially injured thereby. However, nothing in this section shall relieve the governing authority from notifying the affected property owners of the special assessments as required by this chapter.

History. – s. 16, ch. 9298, 1923; CGL 3037; s. 7, ch. 87-103; s. 41, ch. 91-45.

170.17. Denomination of bonds; interest; place of payment; form; signatures; coupons; and delivery. – All bonds issued under this chapter shall be the denomination of $500, or some multiple thereof, and shall bear interest as provided in s. 215.84 until paid in full, payable

annually or semiannually, and both principal and interest shall be payable at such place or places as the governing authority may determine. The form of such bonds shall be fixed by resolution of the governing authority of the municipality, and said bonds shall be signed by the mayor or chief executive officer of the municipality and the clerk or other like officers thereof, under the seal of the municipality; the coupons, if any, shall be executed by the facsimile signatures of said officers. The delivery of any bond and coupon so executed at any time thereafter shall be valid although before the date of delivery the person signing such bond or coupons shall cease to hold office.

History. – s. 17, ch. 9298, 1923; CGL, 3038; s. 13, ch. 59-396; s. 16, ch. 73-302; s. 6, ch. 82-195; s. 4, ch. 92-156.

170.18 Notice required where no newspaper published in the county in which the municipality is situated. – Where, by any of the provisions of this chapter, any notice is required to be given by publication in a newspaper, if there be no newspaper published in the county in which the municipality is situated, then such notice shall be posted for the prescribed period of time in at least five public places in the municipality, one of which shall be the city or town hall, or the place of meeting of the governing authority, if there be no city or town hall.

History. – s. 18, ch. 9298, 1923; CGL 3039.

170.19 Construction and authority of chapter. – This chapter shall, without reference to any other law of Florida, be full authority for the issuance and sale of the bonds by this chapter authorized, and shall be construed

as an additional and alternative method for the financing of the improvements referred to herein. No ordinance, resolution, election or proceeding in respect of the issuance of any bonds hereunder shall be necessary, except such as is required by this chapter, and no publication of any resolution, ordinance, election, notice or proceeding relating to the issuance of the bonds provided for by this chapter shall be required, except such as required by this chapter.

History. – s. 19, ch. 9298, 1923; CGL 3040; s. 14, ch. 59-396.

170.20 Bonds negotiable. – Bonds issued under s. 170.11 shall have all the qualities of negotiable paper under the law merchant, and shall not be invalid for any irregularity or defection in the proceedings for the issue and sale thereof, and shall be incontestable in the hands of bona fide purchasers or holders thereof for value.

History. – s. 20, ch. 9298, 1923; CGL 3041; s. 15, ch. 59-396.

170.21 Provisions of chapter supplemental, additional, and alternative procedure. – This chapter shall not repeal any other law relating to the subject matter hereof, but shall be deemed to provide a supplemental, additional, and alternative method of procedure for the benefit of all cities, towns, and municipal corporations of the state, whether organized under special act or the general law, and shall be liberally construed to effectuate its purpose.

History. – s. 21, ch. 9298, 1923; CGL 3042; s. 16, ch. 59-396.

SUPREME COURT, U.S.
FILED
JUN 5 - 1995
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(2)

No. 94-1827

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

JOHN O. ZIPPERER, JR., an individual,

Petitioner,

v.

THE CITY OF FORT MYERS, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

JOHN S. TURNER
Assistant County Attorney
Counsel of Record
JAMES G. YAEGER,
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15pp

QUESTION PRESENTED

Does the due process clause of the Fourteenth Amendment require local governments to give actual written notice to a mortgagee prior to imposing lawfully authorized and superior special assessment liens for beneficial public improvements constructed at the request of the landowner/mortgagor?

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

John O. Zipperer, Jr.

Respondents:

The City of Fort Myers, a chartered municipality and political subdivision of the State of Florida; Fort Myers City Council, as Governing Authority of the Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Fort Myers City Council, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; Fort Myers City Council, as the Governing Authority of Improvement District No. 17; Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Improvement District No. 15, Omni Interstate Park, Improvement District No. 17; Lee County, a political subdivision of the State of Florida; Colonial Road Extension Improvement Special District Board, as the Governing Authority of the Defendant Special District known as Colonial Road Extension Improvement Special District; and Colonial Road Extension Improvement Special District.[1]

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[1]Although not a named party, the State of Florida filed amicus curiae briefs in support of the Respondents' position in both the Court of Appeals and District Court below and has been served with this Petition.

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STATEMENT OF THE CASE

The party Respondents referred to as Colonial Road Extension Improvement Special District Board, as the governing authority of the Dependent Special District known as Colonial Road Extension Improvement Special District, and Colonial Road Extension Improvement Special District were formed by Lee County, a political subdivision of the State of Florida, and shall be referred to collectively as "Lee County."

Lee County does not dispute the general presentation of Petitioner's rendition of the facts and procedural history of this case, except as noted below.

Lee County, along with the City of Fort Myers (hereinafter "governmental entities"), created by properly enacted resolutions pursuant to Chapters 125, 170, 189, Fla. Stat., special assessment districts to levy assessments (in conformity with Chapter 197, Fla. Stat.) to finance public improvements on real property within the governmental entities' jurisdiction. A portion of these properties were previously the subject of Mr. Zipperer's first mortgage ~~lien~~. The public improvements, which were requested by the property owner/mortgagor, consisted of sewers, potable water, roadways and drainage areas.

Mr. Zipperer concedes these special assessment districts and the adoption and imposition of the assessments, were lawfully enacted and followed the requirements of applicable state statutes. Moreover, Mr. Zipperer has never challenged the legality of the applicable state statutes. Lee County's expenditures for the benefit of

all landowners in the special assessment district exceeded $4 million, and on the subject property, which Mr. Zipperer now owns, over $1 million.

Lee County disputes Mr. Zipperer's characterization of the improvements constructed by the Respondents as "worthless highways, sewers and waterlines which would never have been built through normal commercial institution lending." (Petition for Writ, p. 5-6) Mr. Zipperer never raised an objection in the proceedings below as to the lack of benefit contributed by the improvements, nor the resulting enhancement to the real property in question. He never claimed the special assessment liens for the improvements were confiscatory.

Moreover, Lee County disputes Mr. Zipperer's claim these liens are a "super priority." (Petition for Writ, p. 6) The special assessment liens are given priority status under state law, which he does not challenge. §170.09, Fla. Stat.

SUMMARY OF ARGUMENT

Reasons For Denying A Writ

Mr. Zipperer complains the state-authorized procedures followed by Lee County and Fort Myers in imposing special assessment liens for roadways and utility purposes violated his due process rights under the Fourteenth Amendment.

The state procedure followed by the governmental entities permitted ordinances and resolutions to be adopted which imposed special assessment liens superior to any existing liens, for beneficial public improvements constructed on the subject property. The improvements constructed in this case consisted of infrastructure which was requested by the landowner/mortgagor. When these special assessments were enacted, the governmental entities followed statutory procedures, which did not require actual written notice of the proposed action be given Mr. Zipperer as a mortgagee. Notice was given to the public as a whole by publication as well as actual notice to the landowner(s).

Mr. Zipperer claims these procedures violated his rights under the Fourteenth Amendment. The District Court as well as the Eleventh Circuit Court of Appeals disagreed. These courts rejected Mr. Zipperer's reliance on *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), as authority for his due process claim. The lower courts noted Mr. Zipperer was permitted to foreclose his mortgage and acquire the property in its enhanced condition. His property interest, which consisted of his mortgage, was never impaired. Consequently, no due process claim existed. Both courts relied on *Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991).

ARGUMENT

The central issue for consideration by the Court is whether the Eleventh Circuit Court of Appeals properly concluded Mr. Zipperer had no constitutional due process right.

This Court is urged to uphold the Eleventh Circuit Court of Appeal's reliance on *Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991), which is uncontradicted by decisions in the other circuit courts of appeal.

Lee County submits the decision in *City of New Iberia* is persuasive and should be followed by this Court to deny the writ. In the Fifth Circuit case, the holder of a real estate mortgage challenged the imposition of a special assessment lien levied by a local governmental entity. The assertion was that a "taking" of the mortgage interest resulted from imposition of the lien without giving the mortgagee actual notice.

The mortgagee, as Mr. Zipperer does in this case, argued the governmental entity was required by the due process clause of the Fourteenth Amendment to give it, or its predecessor in title, actual notice of any intended special assessment, and failure to do so resulted in impairment of the mortgagee's property interest without due process of law.

The Fifth Circuit held there was no "taking" and no deprivation of the property interest by the local governmental entity. In ruling against the mortgagee, the court stated:

> The mortgagee's interest in the property is derivative from that of the owner. To allow the mortgagee to assert an unconstitutional taking because of a special assessment sought by the landowner will allow the mortgagee potentially to receive whatever benefit did result from the improvements without having to pay for them. Moreover, this claim by the mortgagee would place an impossible, if not absurd, burden upon the taxing authority: to police the landowner's request for assistance with improvements so that his mortgage will not be discomfited by the ensuing special assessments. FDIC's [the mortgagee's] implicit plea for governmental paternalism in an area normally controlled by sophisticated contractual relationships is as strange as it is unsupported by precedent.

Id. at 615-616.

Mr. Zipperer suggests for the first time in his Petition the infrastructure improvements made by Respondents were "unnecessary and ultimately worthless." (Petition for Writ, p. 10) The reason for this assertion is to stretch his improvident investment into a claim under *Mennonite*. It is clear *Mennonite* only applies if the claimant can show state action "immediately and drastically diminishes the value of this security interest." *Mennonite*,

462 U.S. at 798. By attempting to establish the improvements as worthless, Mr. Zipperer argues the underlying security for the mortgage has been devalued or destroyed, thereby triggering a due process violation.

To establish a procedural due process violation, Mr. Zipperer must demonstrate that (1) he had a property interest which was impaired by state action and (2) the state failed to use constitutionally sufficient procedures in impairing that interest. *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989). In fact, the actual existence of a legitimate property interest is a precursor to the examination of any alleged procedural due process claim. *Thurston v. Dekle*, 531 F.2d 1264, 1271, *vacated* 438 U.S. 901 (1978), *on remand* 578 F.2d 1167 (5th Cir. 1978).

Although the Eleventh Circuit found Mr. Zipperer did have the prerequisite property interest in the mortgage under Florida law, it also noted there was no impairment of this interest by the Respondents' actions in following state authorized special assessment statutes. *Zipperer v. City of Fort Myers*, 41 F.3d 619, 623-24 (11th Cir. 1995).

Consequently, Mr. Zipperer could, and subsequently did, foreclose his mortgage interest, which was unaffected, and is now the owner of the property through the normal foreclosure channels. *Mennonite* would apply only if the state statute and resulting special assessment liens extinguished Mr. Zipperer's mortgage interest--changing his position from one of being a secured creditor to a general, unsecured creditor analogous to bankruptcy cases.

Likewise, Petitioner's reliance on *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), is misplaced for the same reason--the adverse impact of the state action did not result in elimination of the protected property interest. In *Tulsa Professional Collection Services*, a creditor attempted to assert a claim against a deceased's estate after expiration of a two-month window within which creditor's claims must be filed. A state statute required the filing of all creditor's claims, to be a valid claim against the estate, within two months of the date of publication of the appropriate notice.

In holding the Oklahoma state procedure as violative of the due process clause of the Fourteenth Amendment, this Court noted the probate proceedings in question extinguished the entire claim, which is not the situation for Mr. Zipperer. *Tulsa Professional Collection Services* at 577. Unlike Pope's claim, Mr. Zipperer's claim continued unabated and unaffected by the Respondents' actions. His claim has remained fully enforceable, and he subsequently executed the provisions of the promissory note and real estate mortgage with the previous landowner and is now the record owner of the subject property.

Mr. Zipperer also cites *Connecticut v. Doehr*, 501 U.S. 1 (1991), to support his theory that insignificant impairments to property rights support a due process clause. In *Doehr*, this court held the applicable state prejudgment attachment procedure violative of the due process clause as applied to a property owner. There is no doubt as to application of the due process clause to property owners, as attachment procedure would result in the following:

> [A]ttachments ordinarily cloud title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.

Id., 501 U.S. at 2.

As noted herein, Mr. Zipperer's note and mortgage remained viable and enforceable.

CONCLUSION

The procedures followed by the Respondents in adhering to state law do not constitute a violation of the Fourteenth Amendment due process provisions. Consequently, the mortgagee is not entitled actual notice prior to imposition of the special assessment liens.

This Court should uphold the decision of the Eleventh Circuit Court of Appeals below and the substance of the decision in *Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991), by denying Petitioner's writ for certiorari.

Respectfully submitted,

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No. 94-1827

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

JOHN O. ZIPPERER, JR., an individual,

Petitioner,

vs.

THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependent Special District known as Colonial Road Extension Improvement Special District; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, CITY OF FORT MYERS

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In The

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JOHN O. ZIPPERER, JR., an individual,

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THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependent Special District known as Colonial Road Extension Improvement Special District; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, CITY OF FORT MYERS

STATEMENT OF THE CASE

Zipperer alleges to be the holder of a mortgage interest in certain real property owned by P. Gerald DeSimone, as trustee, and more particularly described in the mortgage deed which was executed on August 14, 1986. (See Appendix 1).

The City of Fort Myers, acting through its City Council, pursuant to *Florida Statutes*, Chapter 166 and 170, after petition from the property owners, created by resolutions, Special Assessment Districts 10, 15, and 17. District 10 was created September, 1986, for the construction of local sanitary transmission mains, lift stations, and water transmission mains. District 15 was created in October, 1988, for the construction of a water distribution system, waste water collection system, and paving improvements. District 17 was created in November, 1988, for the design and installation of roadways. On February 2, 1987 and December 17, 1988, the property owners in the geographical area affected by the improvements entered into agreements with the City of Fort Myers for obtaining the levy of a special assessment to pay for these improvements. Accordingly, the Districts were created by resolutions to carry out the agreements sought by the landowners. All of the aforementioned districts encompass the real property in which Zipperer formerly held a mortgage interest.

Through resolutions, the City Council levied special assessments against the mortgaged property for the purpose of conferring benefits to the property as set forth above. Prior to the levy of the assessments, *the property owners on the assessment rolls for each district were provided with actual written notice* of the public meetings held by

the City Council so that they, as well as the general public, could be heard on the issue of the propriety and advisability of the improvements, the assessments and the method therefor. The notice to landowners was made in accordance with the requirements of Section 170.07, *Florida Statutes*. The City duly published, in a newspaper of *general circulation*, notices of the final public equalization hearings for all three (3) special assessment geographical areas prior to levying the lien. Duly passed equalization Resolutions were entered by the City of Fort Myers, after public hearing on March 7, 1988 for Special Assessment District No. 10, May 15, 1989 for Special Assessment District No. 15 and May 15, 1989 for Special Assessment District No. 17. (See Appendix 4).

The Petitioner, ZIPPERER, purchased the property at issue in this litigation at a Clerk's sale, following his foreclosure of the purchase money mortgage given him by Gerald DeSimone.

At the time Mr. ZIPPERER commenced his state court mortgage foreclosure action, and at the time that he acquired title to the property, the liens, which he now attacks on constitutional grounds, were of record, having been created by the CITY OF FORT MYERS pursuant to Chapter 170, *Florida Statutes*. The liens secure the repayment of bond proceeds used to place public improvements on the property[1] in an amount limited to the value contributed to the property by those improvements.[2] Although, interestingly

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[1] 170.01, Florida Statutes, provides that a municipality may provide for the construction of improvements, and "provide for the payment of all or part of the costs of any such improvements by levying and collecting special assessments on the abutting, adjoining, contiguous, or other specially benefitted property".

[2] §170.01(2), Florida Statutes provides that "special assessments may be levied only for the purposes enumerated in this

enough, Mr. ZIPPERER contends that these improvements are now of no value. He has no basis in fact for such an irrational and illogical conclusion. He fails to mention that the improvements were requested by the then property owner and found to be in the public interest by the Fort Myers City Council. (See Resolutions equalizing the assessments and imposing the lien at Appendix 4). He does not contend that they were not properly constructed nor does he contest the fact that funds guaranteed by the public taxpayers were spent for their construction.

The CITY OF FORT MYERS has provided improvements to the property including water and sewer facilities at an estimated cost of up to $13,000,000.00; roadways and paving, at an estimated cost of $10,900,000.00; and the improvement of roadways adjacent to the special assessment district at an estimated cost of $6,017,000.00. Although these improvements are now firmly ensconced on his property, Mr. ZIPPERER does not wish to pay for them.

In each instance, the Petitioner concedes that the procedures required by Florida law were followed. Specifically, the public was provided with published notice of the proposed creation of special assessment districts.[3] The

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section and shall be levied only on benefitted real property at a rate of assessment based on the special benefit accruing to such property from such improvements when the improvements funded by the special assessment provide a benefit which is different in type or degree from benefits provided to the community as a whole.

[3] §170.03, Florida Statutes requires that a municipality publish, in a newspaper of general circulation, notice which includes a description of the nature of the proposed improvements, a designation of the type and location of improvements,

assessments were established at a public meeting, at which input from the public was allowed, and the liens were placed of record before the Petitioner, ZIPPERER, acquired the property at a foreclosure sale.[4] In each case, the Petitioner concedes that his mortgagor, the then owner of the parcel, Mr. DeSimone, was provided with actual written notice of the CITY's consideration of the creation of special assessment districts, and all other notices required by Florida law.[5] The Petitioner nowhere alleges that the owner, or anyone else, objected to the assessment liens which the Petitioner concedes were recorded in order to secure the repayment of bond proceeds used to install these public improvements on the property.

Rather, Mr. ZIPPERER asserts that he holds a property right (a mortgage lien) which was subordinated to the special assessment lien pursuant to Section 170.09, *Florida Statutes*. The effect of the statute, he alleges, was to subordinate the first mortgage lien which he has now foreclosed and reduced to fee simple title, in violation of

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the estimated cost of the improvements, and the manner in which assessments shall be made. Compare §170.04, 170.03, Fla. Stat.

[4] §170.08, Florida Statutes requires that the City Clerk record, in the "improvement lien book" a record of the lien. These liens are also placed in the public records of Lee County, Florida.

[5] Compare §170.06, Florida Statutes, which requires that "ten days notice in writing . . . shall be given to . . . property owners" advising them of the proposed imposition of special assessment liens, the nature of the improvement, and the cost thereof.

his property rights guaranteed under the state and federal Constitutions.

This is so, he asserts, because actual written notice, nowhere required by Florida law, is nonetheless mandated by the due process provisions of both the United States Constitution and the Constitution of the State of Florida.

SUMMARY OF THE ARGUMENT
REASONS FOR DENIAL OF WRIT

The CITY OF FORT MYERS provided millions of dollars of funding, through bond proceeds, to pay for public improvements to real property on which the Petitioner had a mortgage lien. Pursuant to Florida law, and duly adopted and enacted state statutes and city ordinances, notice was provided to the owners of the affected property, and to the public at large. By Statute, the special assessment liens are limited to the value contributed to the property by the public improvements, and are given priority over existing liens and encumbrances. The Petitioner has now acquired the improved property, through foreclosure, and objects to the priority of the special assessment lien given as security to pay for those improvements, although that priority exists to protect Florida taxpayers.

Mr. ZIPPERER asserts that his Fourteenth Amendment due process rights were violated, not by any failure to follow the law of Florida, but by Florida law itself. He asserted below that the failure to provide actual notice to

mortgagees, prior to the adoption and imposition of special assessment liens, denied him the type of notice guaranteed by the Fourteenth Amendment to the United States Constitution. The lower courts have properly rejected his claims.

Mr. ZIPPERER concedes that he retains a plain, speedy and efficient remedy to assert his objections in state court, through foreclosure or otherwise. In fact, the actual foreclosure of the special assessment liens are presently pending in state court. Mr. ZIPPERER's only "property right", under Florida law, remains extant, and is unaffected by the CITY's exercise of its rights under *Florida Statutes*, Chapter 170. Mr. ZIPPERER has not been deprived of his mortgage; he has exercised his right as a mortgagee and has converted that mortgage lien into fee simple title. Any right of "reforeclosure" to contest the priority of the CITY's liens remains available to him under Florida law.

The Petitioner has not presented a colorable claim that his due process rights have been violated, because he has not been deprived of a constitutionally protected property interest, and because, as a matter of law, Florida's special assessment scheme meets constitutional muster. *Utley v. City of St. Petersburg*, 292 U.S. 106 (1938). Foreclosure of these liens, however, requires written notice to all interested parties pursuant to *Florida Statutes*, Chapter 173. (Appendix 2).

The attempt to expand the "regulatory taking" analysis to this dispute must fail, since Mr. ZIPPERER has not been deprived of any use of property, nor has he availed

himself of the available remedies for any possible deprivation which may have occurred, now available under Florida law. Mr. ZIPPERER's reliance upon *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1988) is misplaced, since the facts of that case are more akin to a foreclosure than to the imposition of a lien.

Finally, since Mr. ZIPPERER has concededly foreclosed his mortgage in prior, state court litigation; and has acquired title to the property subject to the prior, recorded special assessment liens, the Eleventh Circuit Court of Appeals properly concluded that his claim of deprivation of his mortgage lien failed to state a cause of action upon which relief could be granted.

For all of these reasons, the Petition for Certiorari should be denied.

ARGUMENT

The proper characterization of the issue is whether the appellate court properly concluded that the Petitioner failed to state a cognizable constitutional claim, since the CITY OF FORT MYERS has neither deprived Mr. ZIPPERER of a "property interest", nor has his "chose in action" been foreclosed from being properly presented in the state court.

The first inquiry was properly directed to whether the Petitioner alleged the existence of a constitutionally protected property interest. Compare *Key West Harbor v. City of Key West*, 987 F.2d 723 (11th Cir. 1993). Property

interests are not created by the United States Constitution, but rather are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law". *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Under Florida law, Mr. ZIPPERER's mortgage lien is not an interest in real property, *United of Florida, Inc. v. Illini Federal Savings & Loan Association*, 341 So.2d 793, 794 (Fla. 2d DCA 1977), but rather creates a choice in action enforceable through foreclosure. Compare *Grieser v. Division of Administration*, 371 So.2d 164, 165 (Fla. 2d DCA 1979). The Florida Supreme Court, in considering the nature of this interest, has held that failure to give actual notice of condemnation proceedings to a mortgagee is harmless error, because "a mortgagee has no estate or title to lands taken by eminent domain; a mortgagee has rather a specific lien for the debt secured by the mortgaged property." *Washington Federal Savings & Loan Association v. Dade County*, 221 So.2d 790, 791 (Fla. 3d DCA 1969), see also *Shavers v. Duval County*, 73 So.2d 684, 687 (Fla. 1954).

Under Florida law, Mr. ZIPPERER had, before foreclosure, a choice in action allowing him to resort to the state courts and enforce his lien claim through foreclosure. That right remains, and is unaffected by the CITY's exercise of its right under *Florida Statutes*, Chapter 170. Thus, even if a cause of action is a species of property protected by the Fourteenth Amendment, *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 428 (1982), *Tulsa Collection Services v. Pope*, 485 U.S. 478 (1988), that right has not been extinguished by the imposition of tax liens. Mr. ZIPPERER concedes that, under Florida law, he has, and retains, the right to foreclose and reforeclose his lien.

If that is so, no "constitutional right" has yet been lost by reason of the CITY's application of a *Florida Statutes*, Chapter 170 lien.

The Petitioner contends his right to due process, as provided under the Fifth and Fourteenth Amendments to the United States Constitution and the Florida Constitution, was abridged by the Respondent's failure to provide him with actual notice of the pendency of assessments against the mortgaged property. He argues that this is particularly so because Section 170.09, *Florida Statutes*, provides that a special assessment lien will be co-equal with liens of other taxes and superior to all other liens such as that held by the Petitioner. However, this specific argument was raised and rejected in a recent case involving similar facts of *Federal Deposit Insurance Corporation v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991), inasmuch as the Fifth Amendment guarantees due process only to those individuals **deprived** of life, liberty or property. (A copy of *New Iberia* is set forth in full in Appendix 3). See also, *Federal Deposit Insurance Corp. v. Morrison*, 747 F.2d 610, 613 (11th Cir. 1984).

In *City of New Iberia, Id.* the plaintiff objected to the imposition of a special assessment lien that had statutory priority over its pre-existing mortgage lien for a paved street and sewage system. The Plaintiff argued that the imposition of the lien was done in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and the imposition of the assessment constituted a "taking" without prior notice due to the fact the special assessment became a superior lien under Louisiana law. In *City of New Iberia, Id.* as in

the present case, the municipality conducted public hearings regarding the improvements and provided no direct written letters giving notice of the hearings to mortgagees of the subject properties.

In concluding the mortgagees' right to due process had not been contravened, the Fifth Circuit held that special assessments do not constitute a "deprivation" or a "taking" of property due to the fact a benefit inures to each parcel of real estate effected. *Id.* In fact, it was noted a municipality may impose a special assessment lien upon property without the benefit of even holding a public hearing and no denial of due process occurs. Compare *Sager v. Burgess*, 350 F.Supp. 1310 (E.D. Penn. 1972).

The Petitioner has attempted to argue the instant action is controlled by *Mennonite Board of Mission v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), which sets forth the broad proposition that a mortgagee is entitled to notice reasonably calculated to apprise him or her of a pending tax sale because, under Indiana law, a mortgagee possesses a protected property interest that is adversely affected by a tax sale. 462 U.S. at 798. The Supreme Court accordingly held that a state may not conduct a tax sale of property without first mailing notice to any interest holder, such as a mortgagee, who is reasonably identifiable in public records. *Id.*

In *City of New Iberia*, the Fifth Circuit recognized the *Mennonite* opinion and its "far-reaching requirement of notice to property owners adversely affected by state action" and noted the case did not analyze what specific state action would constitute a "deprivation" of property

so as to trigger that requirement of actual notice to mortgagees. 921 F.2d at 614. The Court concluded that local tax assessments do not contravene the Fourteenth Amendment unless they amount to such an abuse as to be an outright confiscation of property by conferring absolutely no benefit to a landowner. *Id.* See also, *French v. Barber Asphalt Paving Company*, 181 U.S. 324, 21 S.Ct. 625, 45 L.Ed. 879 (1901); *Wight v. Davidson*, 181 U.S. 371, 21 S.Ct. 616, 45 L.Ed. 900 (1901); *Town of Tonawanda v. Lyon*, 181 U.S. 389, 21 S.Ct. 609, 45 L.Ed. 908 (1901); and *Furey v. City of Sacramento*, 780 F.2d 1448, 1454 (9th Cir. 1986). Therefore, the Court held the due process requirement of actual notice to mortgagees pronounced in *Mennonite* is not applicable to special assessments. See 921 F.2d at 615. Because a mortgagee is not deprived of his property by the assessment of a special improvement lien, the due process clause is not triggered and no issue of constitutionally adequate notice arises. *Id.*

Further support for this position is found in *Wagner v. Leser*, 239 U.S. 207 (1915). In *Wagner*, a public highway was improved and a special tax was imposed on the abutting landowners who challenged the action based on the fact they were given no opportunity to be heard as to the matter and the benefits conferred upon them, and the proper adjustment of the taxes among the property owners. In summarizing the state of law on this subject, the Supreme Court observed: " . . . We think such a tax, when levied by the legislature, did not require notice and a hearing as to the amount and extent of benefits conferred in order to render the legislative action due process of law within the meaning of the Federal Constitution," 239 U.S. at 218. Likewise, in *Withnell v.*

Ruecking, 249 U.S 63, 39 S.Ct. 200, 63 L.Ed. 479 (1919), the Supreme Court found that a lien could be placed on property for the cost of paving a portion of the public street without benefit of advance notice of hearing. 249 U.S. at 70.

Moreover, as concerns the assessments imposed by the City in the present case, it must be reiterated that the landowners specifically requested the improvements for which the assessments were levied. Because the Petitioner's interest in the property is derivative from that of the owner, he may not challenge the assessment. *City of New Iberia*, 921 F.2d at 615-616. "To allow the mortgagee to assert an unconstitutional taking because of the special assessment sought by the landowner would allow the mortgagee to receive whatever benefits did result from the improvements without having to pay for them." *Id.*

In *Utley v. City of St. Petersburg*, 292 U.S. 106 (1938), the United States Supreme Court examined the Florida special assessment provisions. It held that the manner in which the special assessments at issue were adopted under Florida statutory procedures failed to constitute a violation of due process. It must be concluded, based upon the foregoing, that the Respondent was not under an obligation to provide direct written notice to the Petitioner of the various special assessments levied by District 10, District 15, and District 17. Accordingly, no deprivation of the Petitioner's constitutional rights occurred and the Petition for Certiorari should be denied. It should also be noted that Petitioner has not asserted, nor could he assert that he had no actual notice of the City's intention to impose the lien.

CONCLUSION

The due process clause of the Fourteenth Amendment does not require the CITY to give prior written notice to a mortgagee, where there is a duly advertised, public hearing prior to the levy of special assessments and creation of a lien.

The decision of the Eleventh Circuit Court of Appeals' opinion below does not conflict with this Court's opinion in *Mennonite*. The imposition of a special assessment lien is not analogous to a tax sale, whereas, a foreclosure of the lien would be and heightened notice requirements would then be required and are then required under Florida law.

Respectfully submitted,

JACQUELINE WILLIAMS HUBBARD, ESQ.
City Attorney, City of Fort Myers
Post Office Drawer 2217
Fort Myers, Florida 33902
Attorney for Respondent, City of Fort Myers
(941) 332-6707
(941) 332-6127 (FAX)

APPENDIX

I.

Respondent adopts the Appendix of Petitioner in its entirety, A through E.

II.

APPENDIX 1 – The mortgage agreements between John O. Zipperer and Gerald DeSimone.....App. 1

APPENDIX 2 – The full text of *Florida Statutes*, Chapter 173. .....App. 18

APPENDIX 3 – The full text of *Federal Deposit Insurance Corporation v. City of New Iberia*, 921 F.2d 610 (United States Court of Appeals, 5th Cir. 1991).....App. 32

APPENDIX 4 – The Equalization and Loan Imposition Resolutions of Special Assessment Districts No. 10, 15 and 17.....App. 47

APPENDIX 1

THIS MORTGAGE DEED

(Filed Dec. 9, 1986)

2137677

EXECUTED the 14th day of AUGUST, A.D., 1986,

BY P. GERALD DeSIMONE, Trustee, hereinafter called the Mortgagor,

TO JOHN O. ZIPPERER, JR., hereinafter called the Mortgagee,

WITNESSETH, that for divers [sic] good and valuable considerations, and also in consideration of the aggregate sum named in the promissory note of even date herewith, hereinafter described, the said Mortgagor, does grant, bargain, sell, alien, remiss, release, convey and confirm unto the said Mortgagee, in fee simple, all that certain tract of land, of which the said Mortgagor is now seized and possessed, and in actual possession, situate in Lee County, State of Florida, described as follows:

A tract or parcel of land lying in Sections 22, 26, and 27, Township 44 South, Range 25 East, City of Fort Myers, Lee County, Florida which tract or parcel is described as follows:

Beginning at the northeast corner of said Section 27, run North 00° 49' 21" West along the east line of said Section 22 for 1,324.13 feet to a point on the southwesterly right-of-way line (75 feet from the centerline) of Immokalee Road (SR No. 82); thence run North 70° 34' 58" West along said line for 1,219.39 feet to a point on the right-of-way for Interstate 75 (SR No. 93); thence run along said line North 79° 06' 49" West for

606.71 feet, North 70° 34' 58" West for 400.00 feet, North 89° 25' 21" West for 151.74 feet and North 70° 34' 58" West for 132.84 feet to a point on the Limited Access Right-of-Way for said Interstate 75; thence run along said Limited Access Right-of-Way line North 70° 34' 58" West for 298.15 feet, North 72° 24' 39" West for 498.45 feet, North 89° 15' 38" West for 113.48 feet and South 57° 07' 35" West for 47.84 feet to an intersection with the west line of the East 660 feet (as measured on a perpendicular) of the southwest quarter (SW 1/4) of said Section 22; thence run South 00° 42' 36" East along said west line for 2,294.17 feet to the south line of said southwest quarter (SW 1/4); thence run North 89° 32' 16" East along said south line for 660.01 feet to the southeast corner of said southwest quarter (SW 1/4); thence run South 00° 50' 58" East along the West line of the northeast quarter (NE 1/4) of said Section 27 for 2,635.16 feet to the southwest corner of said northeast quarter (NE 1/4); thence run South 89° 23' 30' West along the north line of the southwest quarter (SW 1/4) of said Section 27 for 1,323.67 feet to the northwest corner of the east half (E 1/2) of said southwest quarter (SW 1/4); thence run South 00° 53' 23" East along the west line of said east half (E 1/2) for 1,604.88 feet to an intersection with the Limited Access Right-of-Way line of said Interstate 75; thence run along said Limited Access Right-of-Way line south 28° 42' 11" East for 264.00 feet, South 32° 50' 52" East for 413.32 feet, South 33° 13' 47" East for 149.62 feet, South 46° 54' 03" East for 158.80 feet, South 74° 14' 36" East for 158.83

feet, South 84° 22' 18" East for 323.67 feet and North 89° 10' 20" east for 1,167.60 feet to the end of said Limited Access Right-of-Way line; thence run North 89° 08' 16" East along the Right-of-Way line for said Interstate 75 for 227.83 feet to the Southwest corner of the "Westerly Parcel" of those parcels described in deed recorded in Official Record Book 1608 at page 24, Lee County Records; thence run along the perimeter of said "Westerly Parcel" North 08° 59' 01" West for 90.00 feet, North 46° 30' 59" East for 315.00 feet, North 83° 15' 59" East for 170.00 feet, South 67° 59' 01" East for 165.00 feet and South 32° 29' 02" East for 300.22 feet to said right-of-way line for Interstate 75; thence run North 89° 08' 16" East along said line for 115.05 feet to the southwest corner of the "Easterly Parcel" as described in said deed; thence run along the westerly line of said "Easterly Parcel" North 14° 00' 59" East for 1,205.00 feet, North 14° 59' 01" West for 575.00 feet and North 35° 48' 38" East for 958.11 feet to the Northeast corner of the Southeast quarter (SE 1/4) of said Section 27, said point also being the southwest corner of the "Westerly of Audubon Tract" parcel as described in said deed; thence run along the westerly line of said parcel North 37° 00' 38" East for 565.00 feet and North 44° 30' 38" East for 425.46 feet to an intersection with the west line of the Audubon tract as described in deed recorded in Official Record Book 1119 at page 1031, said records; thence run along the west and north lines of said tract, North 00° 48' 58" west for 234.04 feet and South 89° 37' 12"

East for 350.68 feet to the southwest corner of the "Northerly of Audubon Tract" parcel as described in said deed recorded in Official Record Book 1608 at page 24; thence run along the northerly line of said parcel North 64° 30' 53" East for 165.76 feet and South 84° 59' 07" East for 147.61 feet to the east line of the west half (W 1/2) of the northwest quarter (NW 1/4) of said Section 26; thence run North 00° 52' 08" West along said line for 1,313.33 feet to the south line of the north 280 feet of said west half (W 1/2); thence run North 89° 33' 59" West along the south line for 1,294.07 feet to the west line of said fraction; thence run North 00° 45' 48" West along said west line for 280.06 feet to the Point of Beginning.

Also.

The North 280 feet of the West half (W 1/2) of the Northwest Quarter (NW 1/4) of Section 26, Township 44 South, Range 25 East, Lee County, Florida.

Bearings are Plane Coordinate for the Florida West Zone (1979 adjustment).

Together with all oil, gas and mineral rights that may now be owned or hereafter acquired as to the above described property.

SUBJECT TO easements and restrictions of record.

TO HAVE AND TO HOLD the same, together with the tenements, hereditaments and appurtenances, unto the said Mortgagee in fee simple.

AND said Mortgagor does covenant with said Mortgagee that said Mortgagor is indefeasibly seized of said land in fee simple; that the said Mortgagor has full power and lawful right to convey said land in fee simple as aforesaid; that said land is free from all encumbrances; that said Mortgagor will make such further assurances to perfect the fee simple title to said land in said Mortgagee as may reasonably be required; and that said Mortgagor does hereby fully warrant the title to said land and will defend the same against the lawful claims of all persons whomsoever.

PROVIDED ALWAYS, that if said Mortgagor shall pay unto the said Mortgagee that certain promissory note, of which the following in words and figures is a true copy, to wit:

The undersigned, jointly and severally, promise to pay to the order of JOHN O. ZIPPERER, JR., at Post Office Box 640, Fort Myers, Fl 33902, the sum of EIGHT MILLION NINE HUNDRED THOUSAND AND NO/ 100 DOLLARS, together with interest thereon at the rate of Eleven (11%) per cent per annum, from date; this note shall be payable as follows:

> Interest only shall be paid annually for three (3) years beginning one year from date; thereafter, principal and interest shall be paid in annual payments of $1,511,220.00 each until six annual payments of such amount have been made. The entire balance of principal and interest shall be payable ten (10) years from date.
>
> In the event any scheduled payment of principal and interest is not paid when due the undersigned shall pay a penalty in the amount of

> $5,000.00 per day accruing [sic] until said delinquent payment (plus total accrued penalty assessment) is paid in full. If payment is received on or before 5 days from due date, payee agrees to waive penalty, but if received after 5 days of the due date, penalty shall revert to due date.

As payments are made, they shall first be applied to interest and balance to principal, it being understood that the makers can increase their payments or pay all of the balance due on this indebtedness at any time, and in case of a default in any payment for a period of thirty (30) days, the balance unpaid on this note shall, at the option of the holder, immediately become due and payable, and in case of default the makers shall be liable for all costs of collection, including a reasonable attorney's fee (including fees prior to suit, at trial level, and on all appeals), if this note is placed in the hands of an attorney for collection. The makers and endorsers hereby waive presentment, demand for payment, protest, and notice of protest on this note.

Maker shall have no personal liability upon this note. The sole remedy of the holder shall be to foreclose the purchase money mortgage securing this note; and all holders covenant not to sue upon this note or seek a deficiency judgment.

By: COPY(Seal)
P. Gerald DeSimone,
Trustee

and shall perform, comply with and abide by each and every one of the stipulations, agreements, conditions and covenants of said promissory note and of this deed, then

this deed and the estate hereby created shall cease and be null and void.

AND the said Mortgagor hereby covenants and agrees:

1. To pay all and singular the principal and interest and other sums of money payable by virtue of said promissory note and this deed, or either, promptly on the days respectively the same severally come due.

2. To pay all and singular the taxes, assessments, levies, liabilities, obligations and encumbrances of every nature on said described property each and every, and if the same be not promptly paid the said mortgagee may at any time pay the same without waiving or affecting the option to foreclose or any right hereunder, and every payment so made shall bear interest from the date thereof at the rate of Eleven (11%) per cent, per annum.

3. To pay all and singular the costs, charges and expenses, including lawyer's fees (including fees prior to suit, at trial level, and on all appeals), reasonably incurred or paid at any time by said Mortgagee because of the failure on the part of the said Mortgagor to perform, comply with and abide by each and every the stipulation, agreements, conditions and covenants of said promissory note and this deed, or either, and every such payment shall bear interest from date at the rate of Eleven (11%) per cent, per annum.

4. To permit, commit or suffer no waste, impairment or deterioration of said property or any part thereof.

5. To perform, comply with and abide by each and every the stipulations, agreements, conditions and covenants in said promissory note and in this deed set forth.

6. If any of said sums of money herein referred to be not promptly and fully paid within thirty days next after the same severally become due and payable, or if each and every the stipulations, agreements, conditions and covenants of said promissory note and this deed or either, are not duly performed, complied with and abided by, the said aggregate sum mentioned in said promissory note then remaining unpaid shall become due and payable forthwith or thereafter at the option of the Mortgagee as fully and completely as if the said aggregate sum of EIGHT MILLION NINE HUNDRED THOUSAND AND NO/00 ($8,900,000.00) DOLLARS was originally stipulated to be paid on such day, anything in said promissory note or herein to the contrary notwithstanding.

7. The Mortgagee may, at any time while a suit is pending to foreclose or to reform this mortgage or to enforce any claims arising hereunder, apply to the court having jurisdiction thereof for the appointment of a receiver, and such court shall forthwith appoint a receiver of the premises and all other property covered hereby, including all and singular the income, profits, rents, issues and revenues from whatever source derived, and such receiver shall have all the broad and effective functions and powers in anywise entrusted by a court to a receiver and such appointment shall be made by such court as an admitted equity and a matter of absolute right to said Mortgagee, and without reference to the adequacy or inadequacy of the value of the property mortgaged or to the solvency or insolvency of said Mortgagor or the

defendants, and such income, profits, rents, issues and revenues shall be applied by such receiver according to the lien of this mortgage and the practice of such court.

8. Mortgagee agrees to release portions of subject property from the lien of this mortgage by providing Mortgagor with an executed Partial Release of Lien upon receipt of Mortgagor's written request designating the portion or portions of subject property to be released accompanied with Mortgagor's appropriate release payment to be calculated as follows:

(a) All portions of subject property fronting on existing roads to a depth of 300 feet, shall hereinafter be referred to as "frontage parcels" and shall be released from mortgage lien upon the payment of $100,000.00 per acre.

(b) All portions of subject property other than frontage parcels shall be referred to as "interior parcels" and shall be released from mortgage lien upon the payment of $21,000.00 per acre (130% of original mortgage amount).

It is understood and agreed that Mortgagor's requested release parcels may be in any size and location within subject property with the following express stipulations:

(c) For release purposes, subject property shall be subdivided into two (2) major parcels hereinafter referred to as the "North Parcel" and the "South Parcel", each lying respectively on the North and South sides of the centerline of Florida Power and Light Co. easement recorded in Official Records Book 392, Page 392 and

Official Records Book 384, Page 735, Public Records of Lee County, Florida.

(d) With each one acre of road frontage property released, there shall be (either simultaneously or previously) a corresponding required release of 20 acres of interior property which at Mortgagor's option may either be all in the interior portion of the North parcel or maybe [sic] split with 10 acres being in the interior portion of the South parcel and 10 acres being in the interior portion of the North parcel. Interior portions of the North or South parcels may be independently released without any required corresponding release of frontage property, however, an equal amount of land must always be released from the North parcel simultaneously with the release of lands in the South parcel. All land not released shall always have legal access and shall not be "landlocked".

(e) If in the planning and/or development process, it becomes necessary or desirable (at Mortgagor's discretion) to dedicate or transfer title of portions of Subject Property (with no remuneration to Mortgagor) to any governmental body or agency for land development or property improvement purposes (limited to, road rights-of-way or utility and drainage easements); it is agreed that upon Mortgagor's written request, Mortgagee shall provide Mortgagor with releases of mortgage lien for these rights-of-way and/or easement designated areas at no charge, providing that Mortgagor accompanies its written request with a binding commitment that said easements and/or rights-of-way will be improved with actual streets or utilities within one (1) year or said right-of-way or easements shall revert to owner and be

re-encumbered by this mortgage. Mortgagor warrants that all said reversion agreements entered into by Mortgagor must provide that in the event of reversions of said property to Mortgagee that it shall be free and clear of all encumbrances other than the re-encumbrances of this mortgage lien. Mortgagor's failure to so provide shall constitute a default upon this mortgage.

9. Mortgagor shall have no personal liability upon this mortgage. The sole remedy of the holder shall be to foreclose the purchase money mortgage securing this mortgage; and the holder covenants not to sue for a personal judgment or to seek a deficiency judgment.

IN WITNESS WHEREOF, The said Mortgagor hereunto sets his hand and seal the day and year first above written.

Signed, Sealed and Delivered
in the Presence of:

/s/ Illegible
/s/ Illegible

By: /s/ P. Gerald DeSimone (Seal)
P. GERALD DeSIMONE, Trustee

STATE OF FLORIDA
COUNTY OF LEE

AUG 14 2 illegible PM '86

I, an officer authorized to take acknowledgments of deeds according to the laws of the State of Florida, duly qualified and acting, HEREBY CERTIFY that P. GERALD DeSIMONE, Trustee, to me personally known, this day acknowledged before me that he executed the foregoing mortgage, and I FURTHER CERTIFY that I know the said

person making said acknowledgment to be the individual described in and who executed the said mortgage.

WITNESS my hand and official seal at Fort Myers, County of Lee, and State of Florida, this 14th day of AUGUST, 1986.

My Commission Expires: Aug. Illegible, 1989

/s/ Illegible
Notary Public
(SEAL)

2192101

MORTGAGE MODIFICATION AGREEMENT

THIS MORTGAGE MODIFICATION AGREEMENT made the 18 day of Nov., 1986, by and between P. GERALD DESIMONE, Individually and as Trustee, hereinafter called Mortgagor, and JOHN O. ZIPPERER, JR., hereinafter called Mortgagee,

WHEREAS Mortgagor executed and delivered to Mortgagee that certain Mortgage dated August 14, 1986, and recorded in O.R. Book 1862, page 4282; and

WHEREAS Mortgagor has since acquired certain oil and mineral rights appertaining to the lands described in said Mortgage, and the parties desire to place said oil and mineral rights under the lien of said Mortgage;

NOW THEREFORE, in consideration of the foregoing, the parties mutually agree that the above mentioned Mortgage is modified so that the lien of said Mortgage

shall, in addition to the property described in said Mortgage, shall be upon the oil and mineral rights located in Lee County, Florida and described as follows:

> All oil and mineral rights in and to the property described as follows:
>
> The East 1/2 of Section 27, Township 44 South, Range 25 East; the East 1/2 of the Southwest 1/4 of Section 27, Township 44 South, Range 25 East; and the West 1/2 of the Northwest 1/4 of Section 26, Township 44 South, Range 25 East.

Except as noted herein, all of the terms and conditions of said Mortgage remain the same.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

/s/ Illegible

/s/ Thomas Illegible
witnessed as to
John O. Zipperer, Jr.

/s/ x Illegible

/s/ x Illegible
witness as to
P. Gerald DeSimone

/s/ x P. Gerald DeSimone
P. Gerald DeSimone,
Individually and as
Trustee

/s/ John O. Zipperer, Jr.
John O. Zipperer, Jr.

STATE OF FLORIDA
COUNTY OF LEE

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, P. GERALD DESIMONE, Individually and as Trustee, to me well

known to be the person described in and who executed the foregoing Mortgage Modification Agreement, and he acknowledged before me that he executed the same for the purposes therein expressed.

WITNESS, my hand and official seal at Fort Myers this 18th day of November, 1986.

My Commission Expires:

/s/ Georgette A. Gibboney
Notary Public

(SEAL)

STATE OF FLORIDA
COUNTY OF LEE

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, JOHN O. ZIPPERER, JR., to me well known to be the person described in and who executed the foregoing Mortgage Modification Agreement, and he acknowledged before me that he executed the same for the purposes therein expressed.

WITNESS, my hand and official seal at Fort Myers this 18th day of November, 1986.

My Commission Expires: August 14, 1989

/s/ Illegible
Notary Public

(SEAL)

RETURN TO:

STEWART & KEYES
P. O. DRAWER 790
FORT MYERS, FL 33902

THIS INSTRUMENT PREPARED BY:

STEWART & KEYES
P. O. DRAWER 790
FORT MYERS, FL 33902

PROPERTY APPRAISER'S PARCEL I.D. (FOLIO) NUMBER(S):

2935370

MORTGAGE MODIFICATION AGREEMENT

THIS AGREEMENT made this 26th day of OCTOBER, 1990, by and between:

JOHN O. ZIPPERER, JR., hereinafter called Mortgagee,

and

P. GERALD DeSIMONE, TRUSTEE, hereinafter called Mortgagor.

WHEREAS, Mortgagor executed and delivered to Mortgagee a certain Mortgage recorded in O.R. Book 1862, Page 4282, Public Records of Lee County, Florida; and

WHEREAS, the parties are desirous of amending said mortgage and the note it secures.

NOW THEREFORE, in consideration of the sum of ONE ($1.00) DOLLAR paid by Mortgagor to Mortgagee,

receipt whereof is hereby acknowledged, the parties agree as follows:

1. The principal balance of said mortgage is $8,900,000.00 and the interest is paid to August 14, 1989.

2. The accrued unpaid interest to August 14, 1990 is $979,000.00 Interest on this unpaid interest shall accrue at the rate of twelve (12%) percent per annum until December 1, 1990, at which time all interest that has then accrued shall be due and payable.

Interest on the unpaid principal, or unpaid interest, from time to time after August 14, 1990 shall accrue at the rate of twelve (12%) percent per annum until the entire principal is paid.

STATE OF FLORIDA
COUNTY OF LEE

I HEREBY CERTIFY that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgements, P. GERALD DeSIMONE, Trustee, to me well known to be the person described in and who executed the foregoing Mortgage Modification Agreement, and he acknowledged before me that he executed the same for the purposes therein expressed.

WITNESS, my hand and official seal at FORT MYERS, FLORIDA this 26th day of OCTOBER, 1990.

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXPIRES
AUG. 31, 19illegible
illegible

/s/ illegible
Notary Public

[seal]

I Charlie Green, Clerk of the Circuit Court in and for illegible certify that the foregoing is a true and correct illegible illegible as filed in this office 11/8/90 at 4:21 p.m. illegible or book 2185, page 4652-4654 illegible

Witness my hand and official seal this 8th day of May A.D. 1995

CHARLIE GREEN, CLERK

By /s/ illegible

APPENDIX 2

CHAPTER 173

FORECLOSURE OF MUNICIPAL TAX AND SPECIAL ASSESSMENT LIENS

173.01 Foreclosure of municipal tax certificates authorized.

173.02 Proceedings in rem against the lands.

173.03 Conditions determining when suit may be brought; lands and claims included.

173.04 Procedure for bringing foreclosure suit; certificate of attorney as to notice of suit; jurisdiction obtained by publication of notice of suit; form of notice.

173.05 Parties; time for appearance.

173.06 Affidavits and certificates as prima facie evidence; proof of validity or invalidity.

173.07 Tender of correct amount as condition precedent.

173.08 Judgment for complainant; amounts included; attorney's fee.

173.09 Judgment for complainant; special master's sale; complainant may purchase and later sell.

173.10 Judgment for complainant; court may order payment of other taxes or sale subject to taxes; special master's conveyances.

173.11 Distribution of proceeds of sale.

173.12 Lands may be redeemed prior to sale.

173.13 Procedure under this chapter optional.

173.14 Chapter supplemental to other law.

173.15 Parties and subject matter; tax liens of equal dignity.

173.01 Foreclosure of municipal tax certificates authorized. – The lien of any and all taxes, except those ad valorem taxes collectible by the county tax collector, tax certificates, and special assessments imposed by any incorporated city or town in the state upon real estate may be foreclosed by such city or town by suit in chancery. The practice, pleading, and procedure in any such suit shall be in substantial accordance with the practice, pleading, and procedure for the foreclosure of mortgages of real estate, except as herein otherwise provided.

History. – s. 1, ch. 15038, 1931; CGL 1936 Supp. 3004(2); s. 31, ch. 73-332.

173.02 Proceedings in rem against the lands. – Suits for the foreclosure of tax liens and special assessments under this chapter shall be in the nature of proceedings in rem against the lands upon which said taxes or special assessments are a lien or liens, and it shall not be material that the ownership of said lands be correctly alleged in said proceedings or that parties having an interest or interests in or liens or claims upon said lands be made parties to such proceedings by name or description or be served with process therein, except as hereinafter provided. In any such suits as many lots, parcels or tracts of land, regardless of ownership, and as many tax liens, tax certificates and assessment liens may be included in one suit as the complainant may desire. Any judgment or decree that may be rendered in any such suit shall be enforceable only against such lands.

History. – s. 2, ch. 15038, 1931; CGL 1936 Supp. 3004(3).

173.03 Conditions determining when suit may be brought; lands and claims included. –

(1) Suit may be brought at any time after any one or more of the following events, respectively:

(a) After the expiration of 2 years from the date of any tax certificate issued and held by a city or town whose charter provides for or requires the issuing of tax certificates for delinquent taxes;

(b) After the expiration of 2 years from the date any tax becomes delinquent which was imposed by a city or town whose charter does not provide for or require the issuing of tax certificates; or

(c) After the expiration of 1 year from the date any special assessment or installment thereof becomes due and payable.

(2) There may be included in any suit all or any part of the lands upon which tax certificates have been outstanding or taxes have remained delinquent or any special assessment or installment thereof shall have been in default for the respective periods aforesaid, and there may be included therein all claims and demands of said city or town against said lands or any part thereof for taxes, tax certificates and special assessments or installments thereof which may be due and payable to such city or town at the time of the institution of such suit.

History. – s. 3, ch. 15038, 1931; CGL 1936 Supp. 3004(4).

173.04 Procedure for bringing foreclosure suit; certificate of attorney as to notice of suit; jurisdiction obtained by publication of notice of suit; form of notice.

(1) Any suit hereby authorized shall be commenced by bill in chancery in the circuit court of the county in which such city or town is situated, in the name of the city or town whose taxes, tax certificates and special assessments are sought to be enforced, as complainant, and against any or all lands upon which any taxes, tax certificates and special assessments are delinquent (as the case may be) for the period aforesaid, as defendant, in which bill there shall be briefly described the levy and nonpayment of taxes and special assessments which are delinquent for the period aforesaid, and of all other taxes and special assessments then due and payable to said city or town and sought to be recovered in such bill, the lands proceeded against and the amount chargeable to each parcel or tract. It shall be unnecessary to name in such bill or proceedings any person owning or having any interest in or lien upon such lands as defendants. At least 30 days prior to the filing of any such bill in chancery, written notice of intention to file the same shall be sent by registered mail to the last known address of the holder of the record title and to the holder of record of each mortgage or other lien, except judgment liens, upon each tract of land to be included in said bill in chancery; such notice shall briefly describe the particular lot or parcel of land, shall state the amount of tax certificate and special assessment liens sought to be enforced and shall warn said owner and holders of liens, mortgages or other liens

that on or after the day therein named said bill in chancery to enforce the same will be filed, unless paid on or before said date.

(2) A certificate of the attorney shall be attached to the bill of complaint to the effect that said written notice has been given, and such certificate shall be prima facie evidence that the provisions of this section have been complied with. The complainant's counsel shall make diligent inquiry as to the address of the record title and holders of record liens other than judgments and the clerk of the circuit court shall mail by registered mail a copy of the notice hereinafter provided for, to such record owner and holders of record liens other than judgments at such last known address.

(3) Jurisdiction of any of said lands and of all parties interested therein or having any lien thereon shall be obtained by publication of a notice to be issued as of course by the clerk of the circuit court in which such bill is filed on the request of complainant, once each week for not less than 2 consecutive weeks, directed to all persons and corporations interested in or having any lien or claim upon any of the lands described in said notice and said bill. Such notice shall describe the lands involved and the respective principal amounts sought to be recovered in such suit for taxes, tax certificates and special assessments on such respective parcels of land, and requiring all such parties to appear and defend said suit on or before the day specified in said notice, which shall be not less than 4 weeks after the date of the first publication of such notice. Said notice may be in substantially the following form, with blanks appropriately filled in:

(Name City or Town)
Complainant,

vs.

Certain lands upon which (here insert the word "taxes," or the words "special assessments" or both, as the case may be) are delinquent,

Defendant.

IN THE CIRCUIT COURT FOR ___ COUNTY, FLORIDA

IN CHANCERY.

NOTICE

To all persons and corporations interested in or having any lien or claim upon any of the lands described herein:

You are hereby notified that (name city or town) has filed its bill of complaint in the above named court to foreclose delinquent ___ (here insert the words "tax liens, tax certificates or special assessments," as the case may be) with interest and penalties, upon the parcels of land set forth in the following schedule, the aggregate amount of such ___ (here insert the words "tax liens, tax certificates or special assessments," as the case may be) interest and penalties, against said respective parcels of land, as set forth in said bill of complaint, being set opposite such parcels in the following schedule, to wit:

DESCRIPTION OF LANDS

Amount of ___ (here insert the word "taxes," or the words "special assessments" or both, as the case may be).

In addition to the amounts set opposite each parcel of land in the foregoing schedule, interest and penalties, as

provided by law, on such delinquent taxes and special assessments, together with a proportionate part of the costs and expenses of this suit, are sought to be enforced and foreclosed in this suit.

You are hereby notified to appear and make your defenses to said bill of complaint on or before the ___ day of ___, and if you fail to do so on or before said date the bill will be taken as confessed by you and you will be barred from thereafter contesting said suit, and said respective parcels of land will be sold by decree of said court for nonpayment of said taxes and assessment liens and interest and penalties thereon and the costs of this suit.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said court, this ___ day of ___.

(Clerk of said court.)

By Deputy clerk.)

(4) Proof of publication of said notice, as herein required, shall be by affidavit of the publisher or some agent or employee thereof filed in said cause.

History. – s. 4, ch. 15038, 1931; CGL 1936 Supp. 3004(5); s. 32, ch. 71-355; s. 18, ch. 90-279.

173.05 Parties; time for appearance. – Every person interested in or having any lien upon any parcel of land described in the bill of complaint shall be deemed a party to said cause and may appear and defend said cause within the time specified in such notice. Any person not appearing and defending within such time shall be

deemed to have confessed said bill, but the court may in its discretion and for cause shown enlarge the time within which any such person may appear and defend said cause.

History. – s. 5, ch. 15038, 1931; CGL 1936 Supp. 3004(6).

173.06 Affidavits and certificates as prima facie evidence; proof of validity or invalidity. –

(1) An affidavit or affidavits of the tax collector or other officer of complainant having the duty of issuing or collecting such taxes, special assessments or tax certificates, as to the existence of delinquent taxes, tax certificates and special assessments upon any parcel of land and the time when the same became due, the amount due thereon, including interest and penalties, and the non-payment thereof, shall be received in evidence as prima facie proof of the facts so certified and of the validity of all proceedings in and about the levying and assessment of such taxes and special assessments and the issuing of such tax certificate or certificates.

(2) Tax certificates shall be admissible in evidence and shall be prima facie valid.

(3) No tax certificate shall be held invalid except upon proof that the property was not subject to taxation or that the taxes had been paid previous to any tax sale or prior to the institution of the suit.

History. – s. 5, ch. 15038, 1931; CGL 1936 Supp. 3004(6).

173.07 Tender of correct amount as condition precedent. – If any person shall claim that any tax, tax certificate or assessment is improper or illegal, and seek to contest the same, then such person at the time of filing an answer resisting the foreclosure of any tax lien, tax certificate or assessment lien shall tender into the registry of the court such amount as he claims was properly assessable or for which the property of such person was properly assessable.

History. – s. 5, ch. 15038, 1931; CGL 1936 Supp. 3004(6).

173.08 Judgment for complainant; amounts included; attorney's fee. –

(1) In all cases where the cause may be decided for complainant, the judgment for delinquent taxes, tax certificates and special assessments against any parcel of land shall include the principal of, and interest and penalties on such taxes, tax certificates and special assessments, the costs of the suit and a reasonable attorney's fee; such costs and attorney's fee to be apportioned among and charged against the various parcels of land involved in proportion to the amount of taxes, tax certificates and special assessments adjudged against such respective parcels of land.

(2) In fixing the fees of complainant's attorney the court shall take into consideration the use which the complainant has made of the privilege hereby given of including in one suit divers taxes, tax certificates and assessment liens, and if the court be of the opinion that there has been an unnecessary separation of causes of

action on the same or different parcels of land which might have been joined in the same action, it shall not allow an attorney's fee greater than would have been allowed if the action had been combined.

History. – s. 5, ch. 15038, 1931; CGL 1936 Supp. 3004(6).

173.09 Judgment for complainant; special master's sale; complainant may purchase and later sell. –

(1) Any such decree shall direct the special master thereby appointed to sell the several parcels of land separately to the highest and best bidder for cash (or, at the option of complainant, to the extent of special assessments included in such judgment, for bonds or interest coupons issued by complainant), at public outcry at the courthouse door of the county in which such suit is pending, or at such point or place in the complainant municipality as the court in such final decree may direct, after having advertised such sale (which advertisement may include all lands so ordered sold) once each week for 2 consecutive weeks in some newspaper published in the city or town in which is the complainant or if no such newspaper, in a newspaper published in the county in which the suit is pending, and if all the lands so advertised for sale be not sold on the day specified in such advertisement, such sale shall be continued from day to day until the sale of all such land is completed.

(2) Such sales shall be subject to confirmation by the court, and said special master shall, upon confirmation of the sale or sales, deliver to the purchaser or purchasers at said sale a deed of conveyance of the property so sold;

provided, however, that in any case where any lands are offered for sale by the special master and the sum of the tax, tax certificates and special assessments, interest, penalty, costs and attorney's fee is not bid for the same, the complainant may bid the whole amount due and the special master shall thereupon convey such parcel or parcels of land to the complainant.

(3) The property so bid in by complainant shall become its property in fee simple and may be disposed of by it in the manner provided by law, except that in the sale or disposition of any such lands the city or town may, in its discretion, accept in payment or part payment therefor any bonds or interest coupons constituting liabilities of said city or town.

History. – s. 5, ch. 15038, 1931; CGL 1936 Supp. 3004(6).

173.10 Judgment for complainant; court may order payment of other taxes or sale subject to taxes; special master's conveyances. –

(1) In the judgment or decree the court may, in its discretion, direct the payment of all unpaid state and county taxes and also all unpaid city or town taxes and special assessments or installments thereof, imposed or falling due since the institution of the suit, with the penalties and costs, out of the proceeds of such foreclosure sale, or it may order and direct such sale or sales to be made subject to such state and county and city or town taxes and special assessments.

(2) Any and all conveyances by the special master shall vest in the purchaser the fee simple title to the property so sold, subject only to such liens for state and county taxes or taxing districts whose liens are of equal dignity, and liens for municipal taxes and special assessments, or installments thereof, as are not directed by the decree of sale to be paid out of the proceeds of said sale.

History. – s. 5, ch. 15038, 1931; CGL 1936 Supp. 3004(6).

173.11 Distribution of proceeds of sale. – The proceeds of any foreclosure sale authorized by this chapter shall be distributed by the special master conducting the sale according to the final decree and if any surplus remains after the payment of the full amount of the decree, costs and attorney's fees and any subsequent tax liens which may be directed by such decree to be paid from the proceeds of sale, such surplus shall be deposited with the clerk of the court and disbursed under order of the court.

History. – s. 6, ch. 15038, 1931; CGL 1936 Supp. 3004(7).

173.12 Lands may be redeemed prior to sale. – Any person interested in any lands included in the suit may redeem such lands at any time prior to the sale thereof by the special master by paying into the registry of the court the amount due for delinquent taxes, interest and penalties thereon and such proportionate part of the expense, attorney's fees and costs of suit as may have been fixed by the court in its decree of sale, or by written stipulation

of complainant, and thereupon such lands shall be dismissed from the cause.

History. – s. 7, ch. 15038, 1931; CGL 1936 Supp. 3004(8).

173.13 Procedure under this chapter optional. – The exercise of the power and provisions conferred in this chapter shall be optional with the municipalities and shall not be mandatory upon any municipality of the state. Any municipality desiring to proceed hereunder may elect to proceed hereunder by formal action of its governing authority and by proceeding as described herein.

History. – s. 8, ch. 15038, 1931; CGL 1936 Supp. 3004(9).

173.14 Chapter supplemental to other law. – This chapter shall not repeal any other statute relating to the subject matter hereof, but shall be deemed to provide a supplemental, additional and alternative method of enforcement of tax liens and special assessments for the benefit of all incorporated cities or towns of the state of Florida, whether organized under special act or general laws, and shall be liberally construed to effectuate its purpose.

History. – s. 9, ch. 15038, 1931; CGL 1936 Supp. 3004(10).

173.15 Parties and subject matter; tax liens of equal dignity. –

(1) In the foreclosure of municipal tax and special assessment liens by suit in the nature of proceedings in rem, as provided by this chapter, for the purpose of adjudicating therein all tax liens against the lands being proceeded against, or any portion thereof, and receiving from the proceeds of any foreclosure sale in such proceedings a proper and proportionate share of such proceeds in satisfaction of tax liens so adjudicated, the owner, holder, or assignee of any tax lien, however evidenced of equal or inferior dignity with those of the complainant on or against the lands being proceeded against, or any portion thereof, may be included as and made a party defendant in such proceeding by the service of process on such party defendant in the manner provided by law for service of process on defendants in chancery.

(2) This section is intended to broaden the scope of the foreclosure proceedings authorized by this chapter, so as to permit the adjudication of tax liens of equal dignity in said proceedings, and shall be liberally construed to effectuate such purpose.

History. – ss. 1, 2, ch. 22021, 1943.

APPENDIX 3

FEDERAL DEPOSIT INSURANCE CORPORATION, as Managing Agent for FSLIC Resolution Fund, as Receiver for Alliance Federal Savings and Loan Association, Plaintiff-Appellant,

v.

CITY OF NEW IBERIA and Sewerage District No. 1 of the City of New Iberia, Louisiana, Defendants-Appellees.

No. 89-4658.

United States Court of Appeals,
Fifth Circuit.

Jan. 23, 1991.

Federal Savings and Loan Insurance Corporation (FSLIC) brought action against city and sewerage district to challenge imposition of special assessments and liens which "primed" outstanding mortgage. The United States District Court for the Western District of Louisiana granted summary judgment for defendants. Appeal was taken. The Court of Appeals, 847 F.2d 838, reversed and remanded. Federal Deposit Insurance Corporation (FDIC) was substituted as plaintiff. On remand the District Court, F.A. Little, Jr., J., entered judgment in favor of city and district. FDIC appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that special assessments and liens for paving and sewage system were not "taking" of mortgage interest, and, thus, FDIC had no due process right to notice.

Affirmed.

Stephen L. Williamson, Montgomery, Barnett, Brown, Read, Hammond & Mintz, New Orleans, La., G. Tim Alexander, III, Mouton & Alexander, Lafayette, La., for plaintiff-appellant.

Minos H. Armentor, Armentor & Wattigny, New Iberia, La., for defendants-appellees.

R. Gordon Kean, Jr., Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, Baton Rouge, La., for amicus La. Mun. Assoc.

Appeal from the United States District Court for the Western District of Louisiana.

Before POLITZ, JONES, and BARKSDALE, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Clad in the garb of a crusader for equitable tax practices, a federal government agency, the FDIC,[1] objects to the City of New Iberia, Louisiana's tax liens covering special assessments for a paved street and sewage system built on a developer's property. FDIC contends that the assessments and liens were imposed in violation of the due process clause because under Louisiana law the recordation of the liens, which "prime" that of FDIC, represent a "taking" of FDIC's mortgage interest without prior notice, hence without due process of law. We cannot agree with FDIC's initial premise that the levying of a

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[1] After passage of the FIRREA by Congress, FDIC substituted for FSLIC as plaintiff. References to FDIC here thus also identify its predecessors, FSLIC and Alliance Federal Savings & Loan, the institution taken over by FSLIC.

special assessment and lien for these public improvements, to support their construction with public funds, constitutes a "taking" in this case. Consequently, we affirm the district court's judgment.

I.

FDIC sparked this controversy as receiver of Alliance Federal Savings & Loan Association, the entity which loaned $3 million to the developers so that they could purchase property including Iberia Southport Subdivision part III. The relevant facts were stated by the district court as follows:

"On September 23, 1983, Alliance loaned $3 million to George Oubre and John Levy. The loan was secured by [two mortgages] in favor of Alliance on land identified as the Iberia Southport Subdivision. Iberia Southport Subdivision, in turn, consisted of parts I, II and III, of which parts I and II had been formally subdivided at the time of the loan.

"Parts I and II consist of single and multi-family dwellings, as well as a number of vacant lots zoned for either residential or commercial use. Street and sewerage improvements were constructed in parts I and II by the city pursuant to action by the New Iberia Board of Trustees in 1976 and 1979. In conjunction with those improvements, the city imposed special assessments to be paid in ten annual installments and guaranteed by liens on parts I and II. Upon default of the installments due June 1, 1984, the city brought foreclosure actions which eventually resulted in the developer-owned lots in parts I and II being sold at a sheriff's sale in 1986. Alliance, as

mortgagee, was named as a defendant in the foreclosure proceedings, and eventually purchased a number of the available lots at the sheriff's sale. The city purchased most of the remaining lots. Since the sheriff's sale, however, the city has resold just one lot.

"Parts I and II of Iberia Southport were accessible only from the north. In order to ease the traffic congestion at the north end of the subdivision, Oubre and Levy petitioned the city to construct a new street, Romero Drive, through the as yet undeveloped part III of the subdivision. Romero Drive was positioned to connect the south end of Southport Boulevard, the main north-south artery within the subdivision, with Jefferson Terrace outside the subdivision. Construction of Romero Drive also would be a major first step toward the eventual future development of part III. Oubre and Levy, as owners of the property on both the north and south sides of the proposed Romero Drive, filed their petition with the city, in accordance with La.Rev. Stat. § 33:3331, on November 18, 1983. Oubre and Levy, their spouses, James Romero, and Marie Land Surveying Co., collectively purporting to constitute the owners of 100% of all land fronting both Southport Boulevard and Romero Drive, executed the petition for street and sewer improvements on May 9, 1984.

"On June 19, 1984, the Board of Trustees passed a resolution which expressed the city's intent to proceed with the requested improvements, and which directed the public hearings regarding the improvements be advertised and conducted. According to the text of the resolutions, as well as the testimony of various city officials, public hearings are routinely held in order to allow the

mayor and Board of Trustees to determine the existence and extent of any opposition to the proposed improvements. In addition, the resolution stipulated that '[t]he question of the benefit to each lot or parcel of real estate to be assessed as a result of the construction of said improvements shall also be considered at said public hearing.' The hearings for the proposed construction of Romero Drive and related sewerage improvements were advertised in the *Daily Iberian*. No direct notice of the hearings was given to Alliance, as mortgagee of the subject property. When the public hearings were conducted on July 17, 1984, the city received no objection to the proposed projects. No evidence was presented at trial to indicate that any testimony at the hearing concerned the cost-benefit issue.

"On August 21, 1984, the Board of Trustees passed a pair of resolutions approving the street and sewer construction, directing the city's consulting engineers to prepare plans and specifications for the projects, and directing that the total cost be charged to the lots abutting the proposed improvements. The resolutions also recited a finding by the Board of Trustees that 'each lot or parcel of real estate be assessed . . . , as a result of the construction of [the paving and sewerage] improvements, will be benefited to an amount not less than the amount of the estimated assessment to be levied against each such lot or parcel of real estate.' On January 24, 1985, the engineering report, including the estimated cost of the projects, was filed with the city. On February 19, 1985, the Board of Trustees passed a pair of resolutions which (1) accepted the engineering report; (2) recited a finding that the benefit inuring to each parcel of real estate abutting the

proposed improvements will equal or exceed the amount of the special assessment to be imposed against each such parcel; and (3) directed that each abutting property owner be notified of the improvements, and of the amount and time and manner of repayment of the special assessment. The city executed a contract for construction of the improvements on March 12, 1985. Finally, on April 16, 1985, the city adopted ordinances 327 and 328, which imposed special assessments of $52.60 and $16.10, respectively, per front foot on each parcel of real estate abutting on Romero Drive and the portion of Southport Boulevard improved by the street paving and sewerage project. The ordinances also directed that a lien be imposed against each specially assessed parcel of real estate, which lien primed all other liens and mortgages except prior taxes or recorded assessments. The total amount of the special assessments was $217,194.36. At no time was either Alliance or FSLIC, as mortgagee, notified of any of these actions or improvements concerning the property.

"The construction was completed in March of 1986. On April 16, 1986, Oubre and Levy defaulted on the first installment payment on the special assessments. The city consequently initiated foreclosure proceedings in the 16th Judicial District Court, Iberia Parish, Louisiana. Those proceedings eventually resulted in a sheriff's ale of the subject land, of which the FSLIC had no advance notice, and at which the city purchased all the land up for sale.

"Following the commencement of the state foreclosure proceeding, FSLIC brought this action challenging the imposition, without notice to FSLIC or Alliance, as mortgagee, of the special assessment and the lien which primed the outstanding mortgage. FSLIC seeks a

declaration that the special assessment and lien, and the manner in which they were imposed, impaired the value of FSLIC's property interest without due process, in violation of the Fourteenth Amendment to the U.S. Constitution. Ultimately, FSLIC desires that the lien and special assessment be either invalidated or subordinated in priority to Alliance's prior recorded mortgages now held by FSLIC."

II.

Although the district court satisfied itself as to jurisdiction and the parties have not since raised the issue, it is worthwhile to explain why this case is not barred by the Tax Anti-injunction Statute, 28 U.S.C. § 1341. Section 1341 deprives federal courts of jurisdiction to enjoin, suspend or restrain the assessment, levy or collection of any tax under state law except where no plain, speedy and efficient remedy is available in state courts. While the goal of the statute is to reinforce federalism and comity with the states in matters of local taxation, that goal is not subserved when the local authorities have attempted to tax an instrumentality of the federal government. Consequently, the Supreme Court has concluded,

> in accord with an unbroken line of authority and convincing evidence of legislative purpose that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exaction. (citing five cases)

Department of Employment v. United States, 385 U.S. 355, 358, 87 S.Ct. 464, 466, 17 L.Ed.2d 414 (1966). Applying this principle in the course of a decision that Massachusetts

could not tax materials used in the construction of a new Federal Reserve Bank building, the First Circuit accepted

> . . . the absence of any bright line to facilitate the analysis [of jurisdiction]; each instrumentality must be examined in light of its governmental role and the wishes of Congress in relevant legislation.

Federal Reserve Bank of Boston v. Commissioner of Corporations & Taxation, 499 F.2d 60, 64 (1st Cir.1974). That FSLIC and FDIC are federal agencies exempt from the operation of § 1341 may hardly be doubted. Federal court jurisdiction over their cases has been broadly authorized. *See, e.g.*, 12 U.S.C. § 1730(k)(1), 28 U.S.C. § 1341 on this basis the federal courts may assert jurisdiction over this case.

III.

An earlier, unpublished appearance of this case in our court has affected the current presentation of its issues. *See FSLIC v. City of New Iberia*, 847 F.2d 838 (5th Cir.1988). New Iberia originally moved for a summary judgment on the basis that its procedures in assessing the improvements liens afforded due process to FDIC. Ignoring this point, the district court chose instead to predicate a summary judgment on the FDIC's inability to demonstrate that the benefits conferred on the real estate by the public improvements were less than the tax assessments levied to pay for them. On appeal, this court reversed simply because, as FDIC protested, the agency had been caught unaware by the district courts *sua sponte* rationale. This court observed some skepticism, however, as to

whether such a cost-benefit calculus may lead to an unconstitutional taking of property.

Not heeding the Fifth Circuit's warning, the parties framed the debate on remand as a battle of experts over the precise measurement of the improvements' costs and benefits. The district court decided the case in these terms, and the parties' appellate dispute centers on whether a "taking" should be measured based on the comparison between the assessment for the improvements (about $217,000) and the property's appraised value either at the date they were first authorized by the city (August 21, 1984) or the date the special assessments and liens were imposed (April 16, 1985).[2]

FDIC's entire argument may thus be easily summarized. The district court acknowledged that New Iberia gave no notice to FDIC or its predecessors before it approved the improvements and the special assessments and liens to reimburse the city. The Fourteenth Amendment is violated by a taking without notice of FDIC's mortgage interest if a "taking" actually occurred. Whether a taking occurred depends on whether the improvements increased the value of the property in an amount equal to or greater than their costs. Finally, the date upon which a taking must be measured is the date on which state action " 'immediately and drastically diminish[ed] the value of [FDIC's] interest.' " *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798, 103 S.Ct. 2706,

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[2] As amicus curiae, the Louisiana Municipal Association does contend that the levying of a special assessment for local improvements does not, absent special circumstances, violate the Fourteenth Amendment.

2711, 77 L.Ed.2d 180 (1983) (citing *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 313-14, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950)). FDIC contends that such date is the date of recordation of the city's liens.

The *Mennonite* decision, on which FDIC relies, is grounded on the recognition that "a mortgagee possesses a substantial property interest that is significantly affected by a tax sale [under Indiana law]. . . . The tax sale immediately and drastically diminishes the value of this security interest by granting the tax-sale purchaser a lien with priority over that of all other creditors." 462 U.S. at 798, 103 S.Ct. at 2711. The Court accordingly held that a state may not conduct a tax sale of property without mailing notice to any interest holder, such as a mortgagee, who is reasonably identifiable on the public records. *Id.* Notice to the property owner alone is not equivalent to notice to the mortgagee. *Id.*

Although *Mennonite* espoused a far-reaching requirement of notice to property owners adversely affected by state actions,[3] the case did not analyze, beyond its straightforward facts, what constitutes a "deprivation" of property. It is hardly arguable that under Indiana's law, the interest of a mortgagee is "drastically diminished" by a tax sale that yields a lien with priority over all recorded interests. *Mennonite* in no way suggested, however, that the taxing authority's decision to levy taxes, which

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[3] See the detailed discussion of *Mennonite* and later Supreme Court cases in *Davis Oil Co. v. Mills*, 873 F.2d 774 (5th Cir.1989). *See also* Rubin & Carter, Notice of Seizure in Mortgage Foreclosures and Tax Sale Proceedings: The Ramifications of *Mennonite*, 48 La.L.Rev. 535, 541-44 (1988).

resulted in the unpaid assessment on the underlying property, similarly affected the mortgagee or demanded adequate notice to the mortgagee. Yet FDIC's position in this court, because it rests on the issue whether New Iberia's special assessment was matched by the value of improvements conferred on the subdivision, inextricably entwines the legislative decision to tax with the procedural question of notice. This troubling connection, not envisioned by *Mennonite*, proves to be the Achilles' heel of FDIC's argument.

We cannot agree that FDIC's mortgage interest was "taken" by New Iberia. Perhaps the skeptical caution in our earlier opinion was too subtle. It seems clear that the parties' emphasis on precise measurement of the costs and benefits of the municipal improvements misplaces, as least in this context, the focus of constitutional takings analysis.[4]

The course of Supreme Court decisions on this subject is not entirely smooth,[5] but the majority of its more

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[4] *Compare Agens v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980) ("The application of a general zoning ordinance to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land. . . . " [citations omitted]).

[5] In *Norwood v. Baker*, 172 U.S. 269, 19 S.Ct. 187, 43 L.Ed. 443 (1898), and later in *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478, 36 S.Ct. 204, 60 L.Ed. 392 (1916), the Court seemed to suggest that a special tax burden that was imposed in substantial excess over the landowner's benefit might be struck down. *Norwood*, at least, seems to have been limited by the *French* series of cases, *infra*.

recent decisions have hesitated to place federal courts in the business of reviewing local tax decisions by comparing the cost of special assessments with the value of improvements. Justice Holmes's analysis effectively refutes FDIC's cost-benefit theory of judicial review:

> There is a look of logic when it is said that special assessments are founded on special benefits, and that a law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land – indeed, whether it is a benefit at all – is a matter of forecast and estimate. In its general aspects, at least, it is peculiarly a thing to be decided by those who make the law. The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district, – the municipality, – and to disguise, rather than to answer, the theoretic doubt. It is dangerous to tie down legislatures too closely by judicial constructions not necessarily arising from the words of the Constitution. Particularly, as was intimated in *Spencer v. Merchant*, 125 U.S. 345, 31 L.Ed. 763, 8 Sup.Ct.Rep. 921, it is important for this court to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted, and which it is safe to say that no one then supposed would be disturbed.

Louisville and N.R. Co. v. Barber Asphalt Paving Co., 197 U.S. 430, 25 S.Ct. 466, 49 L.Ed. 819 (1905). In a series of cases decided just a few years earlier, the Court emphasized that local tax assessments would not contravene the Fourteenth Amendment unless they amounted to such an abuse as to be an outright confiscation of property. *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 21 S.Ct. 625, 45 L.Ed. 879 (1901); *Wight v. Davidson*, 181 U.S. 371, 21 S.Ct. 616, 45 L.Ed. 900 (1901); *Town of Tonawanda v. Lyon*, 181 U.S. 389, 21 S.Ct. 609, 45 L.Ed. 908 (1901); *Webster v. City of Fargo*, 181 U.S. 394, 21 S.Ct. 623, 45 L.Ed. 912 (1901); *Cass Farm Company v. City of Detroit*, 181 U.S. 396, 21 S.Ct. 644, 45 L.Ed. 914 (1901); *City of Detroit v. Parker*, 181 U.S. 399, 21 S.Ct. 624, 45 L.Ed. 917 (1901).

FDIC has never contended that New Iberia's special assessment was confiscatory. *See Tonawanda*, 181 U.S. at 391, 21 S.Ct. at 610. Indeed, its expert witness simply contended that the sewage and paving improvements constructed at Southport Subdivision part III failed to increase the real estate value proportionately to their cost and were ill-advised in a declining local real estate market. *French* and *Barber* do not support a constitutional challenge to the assessments on this basis.

But more important, to engage in this second-guessing as if New Iberia forced the improvements upon the subdivision and FDIC is specious. Unlike the above-cited special assessment cases that made their way to the Supreme Court, this one started with the landowners' request to New Iberia for aid in improving their property. "When, in such cases, government merely assists landowners in obtaining money on favorable terms [because of its lower costs to make public improvements], it does

not thereby become responsible for ensuring that the investment yields its expected benefits. . . . " *Furey v. City of Sacramento*, 780 F.2d 1448, 1455 (9th Cir.1986). If, as in *Furey*, the owner-developers of Southport Subdivision III were contesting the assessment after they petitioned for the paving and sewage improvements, no constitutional taking would be recognized. That the result should differ in this scenario because a mortgagee makes the claim is unthinkable. The mortgagee's interest in the property is derivative from that of the owner. To allow the mortgagee to assert an unconstitutional taking because of a special assessment sought by the landowner would allow the mortgagee potentially to receive whatever benefit did result from the improvements without having to pay for them. Moreover, this claim by the mortgagee would place an impossible, if not absurd, burden upon the taxing authority: to police the landowner's requests for assistance with improvements so that his mortgagee will not be discomfited by the ensuing special assessments. FDIC's implicit plea for governmental paternalism in an area normally controlled by sophisticated contractual relationships is as strange as it is unsupported by precedent.

On any one of several grounds, then, we reject the claim that New Iberia deprived FDIC's predecessor of its property when it imposed a special assessment to pay for the public improvements on Southport Part III. First, the Fourteenth Amendment comprehends a challenge to a special tax assessment only if it is so palpably punitive or arbitrary as to confer no benefit on the landowner, or "force[s] a landowner to make an improvement that, while valuable to others, is useless to him." *Furey*, 780

F.2d at 1454. Second, if a landowner requests the improvements for which a special assessment is levied by a taxing authority, neither he nor those whose interests derive from him may challenge the legislature's ascription of benefit to the landowner. See *Furey v. City of Sacramento*, 780 F.2d at 1445. Finally, a mortgagee may not insist that the taxing authority protect it from an imprudent special assessment levied because of the mortgagor's request.

Because FDIC was not deprived of its property by the assessment of a special improvements lien at the request of its mortgagee, no issue of constitutionally adequate notice arises.

IV.

For these reasons, the judgment of the district court granting summary judgment to the City of New Iberia is *AFFIRMED*.

APPENDIX 4

RESOLUTION NO. 88-5

A RESOLUTION ADOPTING THE ASSESSMENT ROLL FOR IMPROVEMENT DISTRICT NUMBER 10, NORTHEAST COLONIAL SEWER AND WATER FACILITIES ALONG WINKLER AVENUE EXTENSION FROM METRO PARKWAY EAST TO INTERSTATE 75, PREPARED BY THE CONSULTING ENGINEERS; FIXING THE TIME AND PLACE FOR A HEARING ON THE ASSESSMENT ROLL; PROVIDING FOR MAILING AND PUBLISHING NOTICE OF SAID HEARING, WHERE THE CITY COUNCIL SHALL CONSIDER COMPLAINTS, EQUALIZE SPECIAL ASSESSMENTS AND APPROVE AND CONFIRM SAME.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FORT MYERS, FLORIDA, that:

SECTION 1. The assessment roll heretofore prepared by the City's consulting engineers and presently on file in the office of the City Clerk be and the same is hereby approved; and it is hereby ascertained and determined that the assessments as set forth in such assessment roll are upon the property to be specially benefited by the proposed public improvements, in proportion to the benefits to be derived therefrom. Such special benefits are determined and prorated on a square foot basis against the respective property to be benefited by the proposed public improvements.

SECTION 2. The 7th day of March, 1988, at 7:30 P.M. at the City Hall in Fort Myers, Florida, is hereby fixed as the time and place at which the owners of the

property to be assessed, or other persons interested therein, may appear before the City Council and be heard as to the propriety and advisability of making certain public improvements, as to the manner of payment therefore, and as to the amount thereof to be assessed against each square foot of property as improved.

SECTION 3. Notice of the above time and place of meeting shall be given to the property owners and shall be substantially the following form:

NOTICE

Notice is hereby given that the City Council of the City of Fort Myers, Florida, will meet on **March 7, 1988 at 7:30 o'clock p.m.,** in the City Hall of Fort Myers, Florida, for the purpose of hearing objections, if any, of all interested persons to the confirmation of Resolution No. 86-48 passed and adopted by the City Council of the City of Fort Myers, Florida, on September 22, 1986; determining to make certain local improvements of water and sewer lines and other appurtenant facilities in Improvement District Number Ten, Northeast Colonial Sewer and Water facilities along Winkler Avenue Extension from Metro Parkway east to Interstate 75, to be financed through special assessments and specifying the lots and parcels of land to be specially assessed therefor. Such interested persons will be heard by the City Council of the City of Fort Myers, Florida, as to propriety and advisability of making said improvements, as to the cost

hereof, as to the manner of payment therefore and as to the amount thereof to be assessed against each square foot of property so improved. The area to be improved is hereby described as follows:

A tract or parcel of land lying in Sections 22, 26, 27, 28, 29, 31, 32, 33 and 34, Township 44 South, Range 25 East and in Section 4, Township 45 South, Range 25 East, in the City of Fort Myers, Florida and/or in Lee County, Florida, which tract or parcel is described as follows:

Beginning at the intersection of the north line of Colonial Boulevard (State Road No. 884) and the west line of the east 425 feet of the Southwest Quarter (SW 1/4) of said Section 31 run northerly along said west line to the north line of said fraction; thence run easterly along said north line to the northwest corner of lands described in Official Record Book 300, Page 206, Lee County Records; thence run southerly to the southwest corner of said lands; thence run easterly to the southeast corner of said lands; thence run northerly to said north line of said fraction, thence run easterly along said north line to the west line of the east 2,301.86 feet of said Section 31; thence run northerly along said west line to the north line of said section; thence run easterly along said north line to the northeast corner of said section; thence run southerly along the line common to said Sections 31 and 32 to the northwest corner of the South Half (S1/2) of the Northwest Quarter (NW1/4) of said Section 32; thence run easterly along the north line of said fraction and the north line of Suburban Estates (Plat Book 8, Page 24, Lee County Records) to the northeast corner of said fraction; thence run

northerly along the west line of the South Half (S1/2) of the Northwest Quarter (NW1/4) of the Northeast Quarter (NE1/4) of said Section 32 and the west line of said Suburban Estates to the northwest corner of said fraction; thence run easterly along the north line of said fraction and said Suburban Estates to the northeast corner of said fraction and said subdivision; thence run northerly along the west line of the Northwest Quarter (NW1/4) of the Northeast Quarter (NE 1/4) of the Northeast Quarter (NE1/4) of said Section 32 to the north line of said section; thence run westerly along the north line of said section and the south line of Homewood Subdivision (Plat Book 7, Page 52, Lee County Records) to the southwest corner of the Southeast Quarter (SE1/4) of Section 29; thence run northerly along the west line of said fraction and the west line of said Homewood Subdivision to the north line of the South Half (S1/2) of the Southwest Quarter (SW1/4) of the Northwest Quarter (NW1/4) of the Southeast Quarter (SE1/4) of said section; thence run easterly along said north line to the northeast corner of said fraction; thence run northerly along the west line of the Southeast Quarter (SE 1/4) of the Northwest Quarter (NW1/4) of the Southeast Quarter (SE1/4) to the northwest corner of said fraction; thence run easterly along the north line of said fraction to the northeast corner of said fraction; thence run northerly along the west line of the Northeast Quarter (NE 1/4) of the Southeast Quarter (SE1/4) of said section to the northwest corner of said fraction; thence run easterly along the north line of said fraction to the line common to Sections 28 and 29; thence run south along said line to the corner common to Sections 28, 29, 32 and 33; thence

run easterly along said north line and the north line of said Section 33 to an intersection with the northerly line of said Colonial Boulevard; thence continue easterly along said northerly line to an intersection with the easterly line of Ortiz Avenue; thence run northerly along said easterly line to the north line of the Southeast Quarter (SE1/4) of the Southeast Quarter (SE1/4) of said Section 28; thence continue northerly along said easterly line of Ortiz Avenue and the westerly line of lands described in deed recorded in Official Record Book 1535 at Page 1993 Lee County Records to a northwest corner thereof; thence run easterly and northerly along northerly and easterly lines of said lands as described in said deed to the north line of Block 5, Beauty Heights Subdivision (Plat Book 8, Page 41, Lee County Records); thence run easterly along said north line and an easterly prolongation thereof to the line common to said Sections 28 and 27; thence run northerly along said line to the northwest corner of the Southwest Quarter (SW1/4) of said Section 27; thence run easterly along the northerly line of said fraction to an intersection with the easterly line of Interstate 75 (State Road No. 93); thence run northwesterly, northerly, northeasterly, easterly and southeasterly along said right-of-way and the right-of-way for Immokalee Road (State Road No. 82) to the east line of said Section 22; thence run southerly along said east line to the northwest corner of said Section 26; thence run easterly along said north line to the northeast corner of the West Half (W1/2) of the Northwest Quarter (NW1/4) of said Section 26; thence run southerly along the east line of said fraction to a northerly line of the Six Mile Cypress as described in Official Record Book

1608 at Page 24, Lee County Records; thence run westerly and southwesterly along the north line of said Six Mile Cypress as described in said deed to an intersection with the north line of the South Half (S1/2) of the Northeast Quarter (NE 1/4) of the Southwest Quarter (SW1/4) of said Northwest Quarter (NW1/4); thence run westerly along said north line to the northwest corner of said fraction; thence run southerly along the west line of said fraction to the northwesterly line of the Six Mile Cypress as described in said deed recorded in Official Record Book 1608 at Page 24, Lee County Records; thence run southwesterly and southerly along said northwesterly line to an intersection with the northerly line of said Colonial Boulevard; thence run westerly along said Colonial Boulevard to an intersection with the northeasterly line of Six Mile Cypress as described in said deed recorded in Official Record Book 1608 at Page 24; thence run northwesterly, westerly, southwesterly and southerly along said Cypress as described in said deed to an intersection with said north line of Colonial Boulevard; thence run southerly across dsaid [sic] Colonial Boulevard to the easterlymost corner of lands described in City of Forth Myers Annexation Ordinance No. 2247; thence run southwesterly, westerly and southwesterly along the southeasterly line of said lands as described in said ordinance and a southwesterly prolongation thereof to an intersection with the westerly line of said Interstate 75; thence run southerly along said westerly line to an intersection with the northwesterly line of Six Mile Cypress as described in deed recorded in Official Record Book 1476 at Page 184, Lee County Records; thence run southwesterly along said

northwesterly line as described in said deed to the south line of said Section 34; thence run westerly along said south line to the southwest corner of said section; thence run southerly along the east line of said Section 4 to the northwesterly line of Six Mile Cypress as described in said deed recorded in Official Record Book Page 1476 at Page 184; thence run southwesterly along said line and the northwesterly line of Six Mile Cypress as described in deed recorded in Official Record Book 1741 at Page 1241, Lee County Records to an intersection with the easterly line of Six Mile Cypress Parkway (250 feet wide) (County Road 865); thence run northeasterly and northerly along said easterly line to an intersection with the south line of the North Half (N1/2) of the Southeast Quarter (SE1/4) of said Section 33; thence run westerly along said south line to the southwest corner of the East Half (E1/2) of the Northwest Quarter (NW1/4) of the Southeast Quarter (SE1/4) of said Section 33; thence run northerly along the west line of said fraction to the northwest corner of said fraction; thence run easterly along the north line of said fraction to an intersection with the west line of Six Mile Cypress Parkway (250 feet wide); thence run northerly along said west line to the south line of the North Half (N1/2) of the Northeast Quarter (NE1/4) of said Section 33; thence run westerly along said south line and the south line of the Northeast Quarter (NE1/4) of the Northeast Quarter (NE1/4) of said Section 33 to the southwest corner of said fraction; thence run northerly along the west line of the Northeast Quarter (NE1/4) of the Northeast Quarter (NE1/4) to an intersection with the northwesterly line of

said Colonial Boulevard; thence run southwesterly along said line to an intersection with the southerly prolongation of the easterly line of Block A, Williams Terrace (Plat Book 6, Page 33, Lee County Records); thence run northerly along said line to the northeast corner of Lot 16, Block A; thence run westerly along the north line of said lot to the northwest corner of said lot; thence run southerly along the west line of said Lot 16 and the west line of Lots 13, 14 and 15 of said Block A to the northwesterly right-of-way line of said Colonial Boulevard; thence run southwesterly along said northwesterly line to the line common to Sections 32 and 33; thence run northerly along said line to an intersection with the westerly prolongation of the south line of Lot 2, Block A, said Williams Terrace; thence easterly to the southeast corner of said Lot 2; thence northerly along the east line of said Lot 2 and Lot 1 said Block A to the north line of the Southwest Quarter (SW1/4) of the Northwest Quarter (NW1/4) of the Northwest Quarter (NW 1/4) of said Section 33; thence run westerly along said north line to the line common to Sections 32 and 33 and the northeast corner of Myers Park Subdivision (Plat Book 6, Page 63, Lee County Records); thence run westerly along the north line of Myers Park Subdivision (Plat Book 6, Page 63, Lee County Records) to the northwest corner of said subdivision; thence run southerly along the east line of the West Half (W1/2) of the East Half (E1/2) of said Northeast Quarter (NE 1/4) of said Section 32 to the northeast corner of lands described in deed recorded in Official Record Book 1528 at Page 1576, Lee County Records; thence run westerly along the north line of said lands to the northeast corner of

lands described in deed recorded in Official Record Book 1536 at Page 244, Lee County Records; thence run southerly along the east line of said lands to said northwesterly line at Colonial Boulevard; thence run southwesterly along said northwesterly line to an intersection with the south line of the Northeast Quarter (NE1/4) of said Section 32; thence run westerly along said south line to the east line of the West Half (W1/2) of the Northeast Quarter (NE1/4) of said Section 32; thence run northerly along the east line to the southeast corner of said Suburban Estates; thence run westerly along the south line of said subdivision to the east line of Block 31 in said subdivision; thence run southerly along said east line to an intersection with the south line of said Northeast Quarter (NE1/4); thence run westerly along said south line and the south line of said Suburban Estates to the northeast corner of the East Half (E1/2) of the West Half (W 1/2) of the Northwest Quarter (NW1/4) of the Southeast Quarter (SE1/4) of said section; thence run southerly along the east line of said fraction to said northwesterly line of Colonial Boulevard; thence run southwesterly along said northwesterly line to an intersection with the east line of the West Half (W1/2) of the West Half (W1/2) of the Northwest Quarter (NW1/4) of the Southeast Quarter (SE1/4) of said Section 32; thence run northerly along said east line to the northeast corner of said fraction and said south line of said Suburban Estates; thence run westerly along said south line and the north line of said fraction to the northeast corner of the West Half (W1/2) of the Southwest Quarter (SW1/4) of said Section 32; thence run southerly along the east line of said fraction to the northeast corner

of lands described in Official Record Book 1712, Page 4329, Lee County Records; thence run westerly along the north line of said lands to the northwest corner of said lands; thence run southerly along the westerly line of said lands to the northwesterly right-of-way line of said Colonial Boulevard; thence run southwesterly along said line to the east line of the west 456.88 feet of the Southwest Quarter (SW1/4) of the Southwest Quarter (SW1/4) of said Section 32; thence run northerly along said east line to the northeast corner of said fraction; thence run westerly along the north line of said fraction to the line common to Sections 31 and 32; thence run southerly along said line to the north right-of-way line of Colonial Boulevard; thence run west along said line to the Point of Beginning. Excepting therefrom right-of-way for Interstate 75 (State Road No. 93).

An assessment roll containing a description of the lots and lands assessed, the amount of the benefits to and the assessments against each square foot of land and the number of annual installments in which the assessment is divided has been completed by the consulting engineers and is on file with the City Clerk. All interested parties are advised that the description of the property to be assessed and the amount to be assessed to each piece or parcel of property may be ascertained at the office of the City Clerk, City of Fort Myers, Florida. Plans and specifications and estimates of the cost thereof are on file in the office of said Clerk at the City Hall in said City.

Dated this 16th day of February, 1988.

City Clerk
City of Fort Myers, Florida

SECTION 4. The City Clerk is hereby directed to mail, not later than ten (10) days prior to such hearing, a copy of the above Notice to each such property owner at his last known address, the names and addresses of such property owners to be obtained from the records of the Tax Assessor of Lee County or from such other sources as the City Clerk or consulting engineers deem reliable, proof of such mailing to be made by affidavit of the City Clerk or the consulting engineers, said proof to be filed with the City Clerk; provided, however, that failure to mail said Notice or Notices shall not invalidate any of the proceedings hereunder. The City Clerk is hereby further directed to cause said Notice to be given by two publications a week apart in a newspaper of general circulation in the City, and if there be no newspaper published in the City said Notice shall be published in like manner in a newspaper of general circulation which is published in Lee County, Florida; provided, however, that the last publication of the above Notice shall be at least one (1) week prior to the date of hearing. Such service by publication shall be verified by the affidavit of the publisher and filed with the City Clerk.

SECTION 5. At the time and place above named, the City Council shall meet as an equalization board to hear and consider complaints as to said assessments and to adjust and equalize the assessment on the basis of justice and right; and, when equalized and confirmed,

such assessments shall stand as first liens, until paid, upon the property against which such assessments are made. Provided, however, upon completion of the improvements, each assessment shall be credited prorata with the difference between the amount originally confirmed and the actual cost of the improvements, provided in no event shall the final assessments exceed the amount of benefits originally assessed. Said assessments shall be co-equal with the lien of other taxes, superior to all other liens, titles and claims, until paid. Said assessments shall bear interest at a rate not exceeding one percent (1%) per annum above the rate of interest payable on the funds to be used in connection with the improvements herein described, which rate is currently estimated to be eight percent (8%) per annum, from the date of acceptance of said improvements shall be payable in ten (10) equal yearly installments. If not paid when due, there shall be added a penalty of one percentum (1%) per month until paid; provided that said assessments may be paid without interest at any time within thirty (30) days after the improvements have been completed and accepted by the City Council. The balance due on the assessments may be paid in full at any time thereafter with interest to the next succeeding installment date; and provide further that payment of annual installments and interest earlier than due in any year shall not be discounted for early payments.

SECTION 6. This resolution shall become effective immediately upon its adoption.

PASSED IN PUBLIC SESSION of the City Council of the City of Fort Myers, Florida, this 16th day of February, A.D., 1988.

/s/ Joan Pigott Porter
Joan Pigott Porter

/s/ Veronica S. Shoemaker
Veronica S. Shoemaker

/s/ Ann M. Knight
Ann M. Knight

/s/ Wilbur C. Smith, III
Wilbur C. Smith, III

/s/ Paul B. Henderson
Paul B. Henderson
Council Members

APPROVED this 16th day of February, A.D., 1988, at 8:45 o'clock p.m.

/s/ Art N. Hamel
Arthur N. Hamel, Mayor

FILED in the Office of the City Clerk this 16th day of February, 1988.

/s/ M.W. Matz
M.W. Matz, City Clerk

I DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL THEREOF ON FILE IN MY OFFICE. WITNESS MY HAND AND SEAL OF SAID CITY THIS 26th DAY OF May, A.D. 1995.

/s/ Dale Veneziano
CITY CLERK, CITY OF
FORT MYERS, FLORIDA

[Exhibits Omitted In Printing]

RESOLUTION NO. 88-8

A RESOLUTION EQUALIZING THE ASSESSMENTS IN IMPROVEMENT DISTRICT NO 10, NORTHEAST COLONIAL SEWER AND WATER FACILITIES ALONG WINKLER AVENUE EXTENSION FROM METRO PARKWAY EAST TO INTERSTATE 75, FORT MYERS, FLORIDA, LEVYING THE SAME AS ASSESSMENTS AGAINST BENEFITTED PROPERTIES, DIRECTING THE CITY CLERK TO RECORD ASSESSMENTS IN THE IMPROVEMENT LIEN BOOK, AND ESTABLISHING PRIORITY OF LIEN AND PAYMENT OF PRINCIPAL AND INTEREST.

WHEREAS: The City Council of the City of Fort Myers, Florida, adopted Resolution No. 88-5 on the 16th day of February, 1988, approving the assessment roll prepared by the consulting engineers in Improvement District Number Ten, Northeast Colonial sewer and water facilities along Winkler Avenue Extension from Metro Parkway east to Interstate 75, and also directing that notice be given by publication and by mail to the owners of the property said district, or any other persons interested therein, and advising that the City Council would meet as an equalizing board commencing on the 7th day of March, 1988, at 7:30 o'clock p.m. to consider complaints as to the assessments appearing on said assessment roll; and subject to incidental changes, additions, substitutions and modifications as shall be deemed by the Council; and

WHEREAS: Said notice both by publication and by mail was duly given as by the law provided; and

WHEREAS: Said hearing was duly and regularly held commencing on March 7, 1988, at 7:30 o'clock p.m.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FORT MYERS, FLORIDA, that:

SECTION 1. The City Council, having heard property owners and other interested persons appearing before the Council as to the propriety and advisability of making improvements described in Resolution No. 88-5 of the Council adopted February 16, 1988, as to the cost thereof, as to the manner of payment of said cost, as to the equalization and adjustment of assessments on the basis of justice and right hereby determines and resolves to proceed with the said improvements according to the plans, specifications, assessment plat and estimate of cost on file.

SECTION 2. The costs of said improvements shall be paid as provided in Section 5 of that certain Resolution No. 88-5 of the City Council heretofore adopted on February 16, 1988, which section is incorporated hereby by reference as though copies in full herein.

SECTION 3. The amount of assessments, as heretofore equalized and adjusted on this date and as now appearing on the assessment roll, attached hereto as "Exhibit A", are hereby confirmed as legal, valid and binding first liens, until paid, upon the property against which such assessments are made; provided, however, that upon completion of the improvements, each assessment shall be increased or decreased prorata with the difference between the amount hereby confirmed and the actual cost of the improvement to be paid by special

assessments; provided, however, that upon completion of the improvements, each assessment shall be increased or decreased prorata with the difference between the amount hereby confirmed and the actual cost of the improvement to be paid by special assessments; provided in no event shall the final assessments, as hereby confirmed, exceed the amount of such benefits originally determined to result from the construction of such improvements. Said assessments shall be co-equal with the lien of other taxes, superior to all other liens, titles and claims, until paid. Such assessments are found and determined to be levied in direct proportion to the special and positive benefits to be received by each of the properties listed in the assessment roll from the acquisition and construction of the improvements.

SECTION 4. The City Clerk is hereby directed to record said assessments in a special book to be known as the "Improvement Lien Book, Series No. Ten".

SECTION 5. This resolution shall become effective immediately upon its adoption.

PASSED IN PUBLIC SESSION of the City Council of the City of Fort Myers, Florida, this 7th day of March, A.D., 1988.

/s/ Joan Pigott Porter
Joan Pigott Porter
/s/ Veronica S. Shoemaker
Veronica S. Shoemaker
/s/ Ann M. Knight
Ann M. Knight

/s/ Wilbur C. Smith, III
Wilbur C. Smith, III
/s/ Paul B. Henderson
Paul B. Henderson
Council Members

APPROVED this 7th day of March, A.D., 1988, at 8:15 o'clock p.m.

/s/ Art N. Hamel
Arthur N. Hamel, Mayor

FILED in the Office of the City Clerk this 7th day of March, 1988.

/s/ M.W. Matz
M.W. Matz, City Clerk

I DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL THEREOF ON FILE IN MY OFFICE. WITNESS MY HAND AND SEAL OF SAID CITY THIS 26th DAY OF May, A.D. 1995.

/s/ Dale Veneziano
CITY CLERK, CITY OF FORT MYERS, FLORIDA

[Exhibits Omitted In Printing]

RESOLUTION NO. 89-26

A RESOLUTION ADOPTING THE ASSESSMENT ROLL FOR IMPROVEMENT DISTRICT NUMBER 15, OMNI INTERSTATE PARK, PREPARED BY THE CONSULTING ENGINEERS; FIXING THE TIME AND PLACE FOR HEARING ON THE ASSESSMENT ROLL; AND PROVIDING FOR MAILING AND PUBLISHING NOTICE OF SAID HEARING, WHERE THE CITY COUNCIL SHALL CONSIDER COMPLAINTS, EQUALIZE SPECIAL ASSESSMENTS AND APPROVE AND CONFIRM SAME.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FORT MYERS, FLORIDA, that:

SECTION 1. The assessment roll heretofore prepared by the consulting engineers and presently on file in the office of the City Clerk be and the same is hereby approved; and it is hereby ascertained and determined that the assessments as set forth in such assessment roll are upon the property to be specially benefited by the proposed public improvements, in proportion to the benefits to be derived therefrom. Such special benefits are determined and prorated on a per acre basis against the respective property to be benefited by the proposed public improvements.

SECTION 2. The 15th day of May, 1989, at 7:30 P.M. at the City Hall in Fort Myers, Florida, is hereby fixed as the time and place at which the owners of the property to be assessed, or other persons interested therein, may appear before the City Council and be heard as to the propriety and advisability of making certain public improvements, as to the manner of payment therefore,

and as to the amount thereof to be assessed against each acre of property as improved.

SECTION 3. Notice of the above time and place of meeting shall be given to the property owners and shall be substantially the following form:

NOTICE

Notice is hereby given that the City Council of the City of Fort Myers, Florida, will meet on **May 15, 1989** at **7:30 o'clock p.m.**, in the City Hall of Fort Myers, Florida, for the purpose of hearing objections, if any, of all interested persons to the confirmation of Resolution No. 88-56 passed and adopted by the City Council of the City of Fort Myers, Florida, on October 17, 1988; determining to make certain local improvements of wastewater distribution system, water distribution system, paving improvements including the construction of Omni Boulevard, S.E. Access and Cypress Loop Road and other appurtenant facilities in Improvement District Number Fifteen, Omni Interstate Park, to be financed through special assessments and specifying the lots and parcels of land to be specially assessed therefor. Such interested persons will be heard by the City Council of the City of Fort Myers, Florida, as to propriety and advisability of making said improvements, as to the cost hereof, as to the manner of payment therefore and as to the amount thereof to be assessed against each acre of property so improved. The area to be improved is hereby described as follows:

All of that part of Section 22, Township 44 South, Range 25 East lying southwesterly of Immokalee Road (State Road 82) and easterly and southerly of Interstate 75 (State Road 93);

and All of that part of the West Half (W1/2) of the Northwest Quarter (NW1/4), Section 26, Township 44 South, Range 25 East lying northwesterly of Six Mile Cypress as described in deed recorded in Official Record Book 1608 at Page 24 and northwesterly of Audubon Tract as described in Official Record Book 1119 at page 1031, Lee County, Records;
AND
All that part of Section 27, Township 44 South, Range 25 East lying easterly of Interstate 75 (State Road 93), northerly of Colonial Boulevard (State Road 884) and northerly and northwesterly of Six Mile Cypress as described in deed recorded in Official Record Book 1608 at page 24, Lee County records. Containing 706.30 acres, more or less.

An assessment roll containing a description of the lots and lands assessed, the amount of the benefits to and the assessments against each acre of land and the number of annual installments in which the assessment is divided has been completed by the consulting engineers and is on file with the City Clerk. All interested parties are advised that the description of the property to be assessed and the amount to be assessed to each piece or parcel of property may be ascertained at the office of the City Clerk, City of Fort Myers, Florida. Plans and specifications and estimates of the cost thereof are on file in the office of said Clerk at the City Hall in said City.

Dated this 17th day of April, 1989.

_____

City Clerk
City of Fort Myers, Florida

SECTION 4. The City Clerk is hereby directed to mail, not later than ten (10) days prior to such hearing, a copy of the above Notice to each such property owner at his last known address, the names and addresses of such property owners to be obtained from the records of the Tax Assessor of Lee County or from such other sources as the City Clerk or consulting engineers deem reliable, proof of such mailing to be made by affidavit of the City Clerk or the consulting engineers, said proof to be filed with the City Clerk; provided, however, that failure to mail said Notice or Notices shall not invalidate any of the proceedings hereunder. The City Clerk is hereby further directed to cause said Notice to be given by two publications a week apart in a newspaper of general circulation in the City, and if there be no newspaper published in the City said Notice shall be published in like manner in a newspaper of general circulation which is published in Lee County, Florida; provided however, that the last publication of the above Notice shall be at least one (1) week prior to the date of hearing. Such service by publication shall be verified by the affidavit of the publisher and filed with the City Clerk.

SECTION 5. At the time and place above named, the City Council shall meet as an equalization board to hear and consider complaints as to said assessments and to adjust and equalize the assessment on the basis of justice and right; and, when equalized and confirmed, such assessments shall stand as first liens, until paid, upon the property against which such assessments are made. Provided, however, upon completion of the improvements, each assessment shall be credited prorata

with the difference between the amount originally confirmed and the actual cost of the improvements, provided in no event shall the final assessments exceed the amount of benefits originally assessed. Said assessments shall be co-equal with the lien of other taxes, superior to all other liens, titles and claims, until paid. Said assessments shall bear interest at a rate not exceeding one percent (1%) per annum above the rate of interest payable on the funds to be used in connection with the improvements herein described, which rate is currently estimated to be Eight and Three-Quarters Percent (8.75%) per annum, from the date of acceptance of said improvements shall be payable in ten (10) equal yearly installments. If not paid when due, there shall be added a penalty of one percentum (1%) per month until paid; provided that said assessments may be paid without interest at any time within thirty (30) days after the improvements have been completed and accepted by the City Council. The balance due on the assessments may be paid in full at any time thereafter with interest to the next succeeding installment date; and provided further that payment of annual installments and interest earlier than due in any year shall not be discounted for early payments.

SECTION 6. This resolution shall become effective immediately upon its adoption.

PASSED IN PUBLIC SESSION of the City Council of the City of Fort Myers, Florida, this 17th day of April, A.D., 1989.

/s/ Joan Pigott Porter
Joan Pigott Porter

Veronica S. Shoemaker

/s/ Ann M. Knight
Ann M. Knight

/s/ Richard G. Bashaw
Richard G. Bashaw

/s/ Bruce Grady
Bruce Grady
Council Members

APPROVED this 17th day of April, A.D., 1989, at 7:56 o'clock p.m.

/s/ Wilbur C. Smith
Wilbur C. Smith, III, Mayor

FILED in the Office of the City Clerk this 17th day of April, 1989.

/s/ M.W. Matz
M.W. Matz, City Clerk

I DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL THEREOF ON FILE IN MY OFFICE. WITNESS MY HAND AND SEAL OF SAID CITY THIS 26th DAY OF May, A.D. 1995.

/s/ Dale Veneziano
CITY CLERK, CITY OF FORT MYERS, FLORIDA

[Exhibits Omitted In Printing]

RESOLUTION NO. 89-32

A RESOLUTION EQUALIZING THE ASSESSMENTS IN IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK, FORT MYERS, FLORIDA, LEVYING THE SAME AS ASSESSMENTS AGAINST BENEFITTED PROPERTIES, DIRECTING THE CITY CLERK TO RECORD ASSESSMENTS IN THE IMPROVEMENT LIEN BOOK, AND ESTABLISHING PRIORITY OF LIEN AND PAYMENT OF PRINCIPAL AND INTEREST.

WHEREAS: The City Council of the City of Fort Myers, Florida, adopted Resolution No. 89-26 on the 17th day of April 1989, approving the assessment roll prepared by the consulting engineers in Improvement District Number Fifteen, Omni Interstate Park, and also directing that notice be given by publication and by mail to the owners of the property said district, or any other persons interested therein, and advising that the City Council would meet as an equalizing board commencing on the 15th day of May, 1989, at 7:30 o'clock p.m. to consider complaints as to the assessments appearing on said assessment roll; and subject to incidental changes, additions, substitutions and modifications as shall be deemed by the Council; and

WHEREAS: Said notice both by publication and by mail was duly given as by law provided; and

WHEREAS: Said hearing was duly and regularly held commencing on May 15, 1989, at 7:30 o'clock p.m.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FORT MYERS, FLORIDA, that:

SECTION 1. The City Council, having heard property owners and other interested persons appearing before the Council as to the propriety and advisability of making improvements described in Resolution No. 89-26 of the Council adopted April 17, 1989, as to the cost thereof, as to the manner of payment of said cost, as to the equalization and adjustment of assessments on the basis of justice and right hereby determines and resolves to proceed with the said improvements according to the plans, specifications, assessment plat and estimate of cost on file.

SECTION 2. The costs of said improvements shall be paid as provided in Section 5 of that certain Resolution No. 89-26 of the City Council heretofore adopted on April 17, 1989, which section is incorporated hereby by reference as though copies in full herein.

SECTION 3. The amount of assessments, as heretofore equalized and adjusted on this date and as now appearing on the assessment roll, attached hereto as "Exhibit A", are hereby confirmed as legal, valid and binding first liens, until paid, upon the property against which such assessments are made; provided, however,

that upon completion of the improvements, each assessment shall be increased or decreased prorata with the difference between the amount hereby confirmed and the actual cost of the improvement to be paid by special assessments; provided, however, that upon completion of the improvements, each assessment shall be increased or decreased prorata with the difference between the amount hereby confirmed and the actual cost of the improvement to be paid by special assessments; provided in no event shall the final assessments, as hereby confirmed, exceed the amount of such benefits originally determined to result from the construction of such improvements. Said assessments shall be co-equal with the lien of other taxes, superior to all other liens, titles and claims, until paid. Such assessments are found and determined to be levied in direct proportion to the special and positive benefits to be received by each of the properties listed in the assessment roll from the acquisition and construction of the improvements.

SECTION 4. The City Clerk is hereby directed to record said assessments in a special book to be known as the "Improvement Lien Book, Series No. Fifteen".

SECTION 5. This resolution shall become effective immediately upon its adoption.

PASSED IN PUBLIC SESSION of the City Council of the City of Fort Myers, Florida, this 15th day of May, A.D., 1989.

/s/ Joan Pigott Porter
Joan Pigott Porter

/s/ Veronica S. Shoemaker
Veronica S. Shoemaker

/s/ Ann M. Knight
Ann M. Knight

/s/ Richard G. Bashaw
Richard G. Bashaw

/s/ Bruce Grady
Bruce Grady
Council Members

APPROVED this 15th day of May, A.D., 1989, at 7:43 o'clock p.m.

/s/ Wilbur C. Smith
Wilbur C. Smith, III, Mayor

FILED in the Office of the City Clerk this 15th day of May, 1989.

/s/ M.W. Matz,
M.W. Matz, City Clerk

I DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL THEREOF ON FILE
IN MY OFFICE WITNESS MY HAND AND SEAL OF SAID CITY THIS 26th DAY OF May, A.D. 1995

/s/ Dale Vergiano
CITY CLERK, CITY OF
FORT MYERS, FLORIDA

[Exhibit Omitted In Printing]

RESOLUTION NO. 89-25

A RESOLUTION ADOPTING THE ASSESSMENT ROLL FOR IMPROVEMENT DISTRICT NUMBER 17, OMNI INTERSTATE PARK – ROADS – COLONIAL BOULEVARD, SIX MILE CYPRESS AND ORTIZ BOULEVARD, PREPARED BY THE CONSULTING ENGINEERS; FIXING THE TIME AND PLACE FOR HEARING ON THE ASSESSMENT ROLL; AND PROVIDING FOR MAILING AND PUBLISHING NOTICE OF SAID HEARING, WHERE THE CITY COUNCIL SHALL CONSIDER COMPLAINTS, EQUALIZE SPECIAL ASSESSMENTS AND APPROVE AND CONFIRM SAME.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FORT MYERS, FLORIDA, that:

SECTION 1. The assessment roll heretofore prepared by the consulting engineers and presently on file in the office of the City Clerk be and the same is hereby approved; and it is hereby ascertained and determined that the assessment as set forth in such assessment roll are upon the property to be specially benefited by the proposed public improvements, in proportion to the benefits to be derived therefrom. Such special benefits are determined and prorated on a per acre basis against the

respective property to be benefited by the proposed public improvements.

SECTION 2. The 15th day of May, 1989, at 7:30 P.M. at the City Hall in Fort Myers, Florida, is hereby fixed as the time and place at which the owners of the property to be assessed, or other persons interested therein, may appear before the City Council and be heard as to the propriety and advisability of making certain public improvements, as to the manner of payment therefore, and as to the amount thereof to be assessed against each acre of property as improved.

SECTION 3. Notice of the above time and place of meeting shall be given to the property owners and shall be substantially the following form:

NOTICE

Notice is hereby given that the City Council of the City of Fort Myers, Florida, will meet on **May 15, 1989** at **7:30 o'clock p.m.**, in the City Hall of Fort Myers, Florida, for the purpose of hearing objections, if any, of all interested persons to the confirmation of Resolution No. 88-64 passed and adopted by the City Council of the City of Fort Myers, Florida, on November 21, 1988; determining to make certain local improvements including the design and installation of roadways known as Colonial Boulevard, Six Mile Cypress and Ortiz Boulevard and other appurtenant facilities in Improvement District Number Seventeen, Omni Interstate Park – Roads, to be financed through special assessments and specifying the lots and parcels of land to be specially assessed therefor. Such interested persons will be heard by the City

Council of the City of Fort Myers, Florida, as to propriety and advisability of making said improvements, as to the cost hereof, as to the manner of payment therefore and as to the amount thereof to be assessed against each acre of property so improved. The area to be improved is hereby described as follows:

All that part of Section 22, Township 44 South, Range 25 East lying southwesterly of Immokalee Road (State Road 82) and easterly and southerly of Interstate 75 (State Road 93); and

All that part of the West Half (W 1/2) of the Northwest Quarter (NW 1/4) of Section 26, Township 44 South, Range 25 East lying northwesterly of Six Mile Cypress as described in deed recorded in Official Record Book 1608 at page 24 and northwesterly of Audubon Tract as described in Official Record Book 1119 at page 1031, Lee County records;

and

All that part of Section 27, Township 44 South, Range 25 East lying easterly of Interstate 75 (State Road 93), northerly of Colonial Boulevard (State Road 884) and northerly and northwesterly of Six Mile Cypress as described in deed recorded in Official Record Book 1608 at page 24, Lee County Records.

and

The Northeast Quarter (NE 1/4) of the Northeast Quarter (NE 1/4), the Southeast Quarter (SE 1/4) of the Northeast Quarter (NE 1/4), the Northeast Quarter (NE 1/4) of the Southeast quarter (SE 1/4), less rights-of-way for Colonial Boulevard (State Road 884); and Six Mile Cypress Parkway

(County Road 865) Section 33, Township 44 South, Range 25 East;

and

The West Half (W 1/2) of Section 34 lying southerly of Colonial Boulevard (State Road 884), westerly of Interstate 75 (State Road 93) and northwesterly of Six Mile Cypress as recorded in Official Record Book 1476 at page 185 of the public records of Lee County, Township 44 South, Range 25 East, City of Fort Myers Lee County, Florida.

Containing 996.68 acres, more or less.

As assessment role containing a description of the lots and lands assessed, the amount of the benefits to and the assessments against each acre of land and the number of annual installments in which the assessment is divided has been completed by the consulting engineers and is on file with the City Clerk. All interested parties are advised that the description of the property to be assessed and the amount to be assessed to each piece or parcel of property may be ascertained at the office of the City Clerk, City of Fort Myers, Florida. Plans and specifications and estimates of the cost thereof are on file in the office of said Clerk at the City Hall in said City.

Dated this 17th day of April, 1989

/s/ _____
City Clerk
City of Fort Myers, Florida

SECTION 4. The City Clerk is hereby directed to mail, not later than ten (10) days prior to such hearing, a copy of the above Notice to each such property owner at

his last known address, the names and addresses of such property owners to be obtained from the records of the Tax Assessor of Lee County or from such other sources as the City Clerk or consulting engineers deem reliable, proof of such mailing to be made by affidavit of the City Clerk or the consulting engineers, said proof to be filed with the City Clerk; provided, however, that failure to mail said Notice or Notices shall not invalidate any of the proceedings hereunder. The City Clerk is hereby further directed to cause said Notice to be given by two publications a week apart in a newspaper of general circulation in the City, and if there be no newspaper published in the City said Notice shall be published in like manner in a newspaper of general circulation which is published in Lee County, Florida; provided, however, that the last publication of the above Notice shall be at least one (1) week prior to the date of hearing. Such service by publication shall be verified by the affidavit of the publisher and filed with the City Clerk.

SECTION 5. At the time and place above named, the City Council shall meet as an equalization board to hear and consider complaints as to said assessments and to adjust and equalize the assessment on the basis of justice and right; and, when equalized and confirmed, such assessments shall stand as first liens, until paid, upon the property against which such assessments are made. Provided, however, upon completion of the improvements, each assessment shall be credited prorata with the difference between the amount originally confirmed and the actual cost of the improvements, provided in no event shall the final assessments exceed the amount of benefits originally assessed. Said assessments shall be

co-equal with the lien of other taxes, superior to all other liens, titles and claims, until paid. Said assessments shall bear interest at a rate not exceeding one percent (1%) per annum above the rate of interest payable on the funds to be used in connection with the improvements herein described, which rate is currently estimated to be Eight and Three-Quarters Percent (8.75%) per annum, from the date of acceptance of said improvements shall be payable in ten (10) equal yearly installments. If not paid when due, there shall be added a penalty of one percentum (1%) per month until paid; provided that said assessments may be paid without interest at any time within thirty (30) days after the improvements have been completed and accepted by the City Council. The balance due on the assessments may be paid in full at any time thereafter with interest to the next succeeding installment date; and provided further that payment of annual installments and interest earlier than due in any year shall not be discounted for early payments.

SECTION 6. This resolution shall become effective immediately upon its adoption.

PASSED IN PUBLIC SESSION of the City Council of the City of Fort Myers, Florida, this 17th day of April, A.D., 1989.

/s/ Joan Pigott Porter
Joan Pigott Porter

Veronica S. Shoemaker

/s/ Ann M. Knight
Ann M. Knight

/s/ Richard G. Bashaw
Richard G. Bashaw
/s/ Bruce Grady
Bruce Grady
Council Members

APPROVED this 17th day of April, A.D., 1989, at 7:55 o'clock p.m.

/s/ Wilbur C. Smith
Wilbur C. Smith, III, Mayor

FILED in the Office of the City Clerk this 17th day of April, 1989.

/s/ M.W. Matz
M.W. Matz, City Clerk

[Exhibits Omitted In Printing]

RESOLUTION NO. 89-33

A RESOLUTION EQUALIZING THE ASSESSMENTS IN IMPROVEMENT DISTRICT NO. 17, OMNI INTERSTATE PARK – ROADS, FORT MYERS, FLORIDA, LEVYING THE SAME AS ASSESSMENTS AGAINST BENEFITTED PROPERTIES, DIRECTING THE CITY CLERK TO RECORD ASSESSMENTS IN THE IMPROVEMENT LIEN BOOK, AND ESTABLISHING PRIORITY OF LIEN AND PAYMENT OF PRINCIPAL AND INTEREST.

WHEREAS: The City Council of the City of Fort Myers, Florida, adopted Resolution No. 89-25 on the 17th

day of April, 1989, approving the assessment roll prepared by the consulting engineers in Improvement District Number Seventeen, Omni Interstate Park – Roads, and also directing that notice be given by publication and by mail to the owners of the property said district, or any other persons interested therein, and advising that the City Council would meet as an equalizing board commencing on the 15th day of May, 1989, at 7:30 o'clock p.m. to consider complaints as to the assessments appearing on said assessment roll; and subject to incidental changes, additions, substitutions and modifications as shall be deemed by the Council; and

WHEREAS: Said notice both by publication and by mail was duly given as by law provided; and

WHEREAS: Said hearing was duly and regularly held commencing on May 15, 1989, at 7:30 o'clock p.m.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FORT MYERS, FLORIDA, that:

SECTION 1. The City Council, having heard property owners and other interested persons appearing before the Council as to the propriety and advisability of making improvements described in Resolution No. 89-25 of the Council adopted April 17, 1989, as to the cost thereof, as to the manner of payment of said cost, as to the equalization and adjustment of assessments on the basis of justice and right hereby determines and resolves to proceed with the said improvements according to the plans, specifications, assessment plat and estimate of cost on file.

SECTION 2. The costs of said improvements shall be paid as provided in Section 5 of that certain Resolution No. 89-25 of the City Council heretofore adopted on April 17, 1989, which section is incorporated hereby by reference as though copies in full herein.

SECTION 3. The amount of assessments, as heretofore equalized and adjusted on this date as now appearing on the assessment roll, attached hereto as "Exhibit A", are hereby confirmed as legal, valid and binding first liens, until paid, upon the property against which such assessments are made; provided, however, that upon completion of the improvements, each assessment shall be increased or decreased prorata with the difference between the amount hereby confirmed and the actual cost of the improvement to be paid by special assessments; provided, however, that upon completion of the improvements, each assessment shall be increased or decreased prorata with the difference between the amount hereby confirmed and the actual cost of the improvement to be paid by special assessments; provided in no event shall the final assessments, as hereby confirmed, exceed the amount of such benefits originally determined to result from the construction of such improvements. Said assessments shall be co-equal with the lien of other taxes, superior to all other liens, titles and claims, until paid. Such assessments are found and determined to be levied in direct proportion to the special and positive benefits to be received by each of the properties listed in the assessment roll from the acquisition and construction of the improvements.

SECTION 4. The City Clerk is hereby directed to record said assessments in a special book to be known as the "Improvement Lien Book, Series No. Seventeen".

SECTION 5. This resolution shall become effective immediately upon its adoption.

PASSED IN PUBLIC SESSION of the City Council of the City of Fort Myers, Florida, this 15th day of May, A.D., 1989.

/s/ Joan Pigott Porter
Joan Pigott Porter

/s/ Veronica S. Shoemaker
Veronica S. Shoemaker

/s/ Ann M. Knight
Ann M. Knight

/s/ Richard G. Bashaw
Richard G. Bashaw

/s/ Bruce Grady
Bruce Grady
Council Members

APPROVED this 15th day of May, A.D., 1989, at 7:44 o'clock p.m.

/s/ Wilbur C. Smith
Wilbur C. Smith, III, Mayor

FILED in the Office of the City Clerk this 15th day of May, 1989.

/s/ M. W. Matz
M. W. Matz, City Clerk

I DO HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL THEREOF ON FILE IN MY OFFICE. WITNESS MY HAND AND SEAL OF SAID CITY THIS 26th DAY OF May, A.D. 1995.

/s/ Dale Veneziano
CITY CLERK, CITY OF FORT MYERS, FLORIDA

[Exhibits Omitted In Printing]

No. 94-1827

Supreme Court, U.S.
FILED
JUL 5 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

JOHN O. ZIPPERER, JR., an individual,

Petitioner,

vs.

THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependent Special District known as Colonial Road Extension Improvement Special District; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF TO THE CITY OF FORT MYERS' AND LEE COUNTY'S BRIEFS IN OPPOSITION TO JOHN O. ZIPPERER JR.'S PETITION FOR A WRIT OF CERTIORARI

*John H. Rains, III
William P. Gray, III
Annis, Mitchell, Cockey, Edwards & Roehn, P.A.
Post Office Box 3433
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Attorneys for Petitioner

(**Counsel of Record*)

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause of the Fourteenth Amendment requires a public body to give prior actual written notice to the owner of a prior-recorded first mortgage lien, whose address is easily ascertainable from the public records, of special assessment hearings which create enormous "super-priority" special assessment liens that immediately and drastically diminish the value of the prior-recorded first mortgage lien by subordinating the first mortgage lien to the super-priority special assessment liens?

2. Does the decision of the court of appeals below, which holds that an owner of a prior-recorded Florida first mortgage lien is not entitled to prior actual notice of the subordination of his first lien to millions of dollars of super-priority special assessment liens, conflict with this Court's decision in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), which holds that a super-priority lien arising from a tax sale does immediately and drastically diminish the value of a prior-recorded mortgage lien?

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

JOHN O. ZIPPERER, JR.

Respondents:

The City of Fort Myers, a chartered municipality and political subdivision of the State of Florida; Fort Myers City Council, as Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; Fort Myers City Council, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; Fort Myers City Council, as the Governing Authority of Improvement District No. 17; Improvement District No. 10, Northeast Colonial Sewer and Water District; Improvement District No. 15, Omni Interstate Park; Improvement District No. 17; Lee County, a political subdivision of the State of Florida; Colonial Road Extension Improvement Special District Board, as the Governing Authority of the Dependent Special District known as Colonial Road Extension Improvement Special District; Colonial Road Extension Improvement Special District.[1]

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[1] Although not a named party, the State of Florida filed amicus curiae briefs in support of the Respondents' position in both the Court of Appeals and District Court below and has been served with this Petition.

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APPENDIX

APPENDIX A – Amended Complaint And Demand For Jury Trial Of John O. Zipperer, Jr A1

No. 94-1827

In The

Supreme Court of the United States

October Term, 1995

JOHN O. ZIPPERER, JR., an individual,

Petitioner,

vs.

THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependent Special District known as Colonial Road Extension Improvement Special District; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF TO THE CITY OF FORT MYERS' AND LEE COUNTY'S BRIEFS IN OPPOSITION TO JOHN O. ZIPPERER JR.'S PETITION FOR A WRIT OF CERTIORARI

Petitioner, John O. Zipperer, Jr., respectfully files this reply brief in support of his Petition for a Writ of

Certiorari and in response to the City of Fort Myers' and Lee County's Briefs in Opposition to Mr. Zipperer's Petition.

STATEMENT OF THE CASE

Mr. Zipperer disagrees with numerous of Lee County's and the City of Fort Myers' factual assertions which are stated in their briefs in opposition to Mr. Zipperer's Petition for Certiorari. On page 1 of its Brief in Opposition, Lee County states that Mr. Zipperer has conceded that the special assessment districts and the adoption and imposition of the special assessments were lawfully enacted and followed the applicable requirements of state statutes. Even a brief perusal of Mr. Zipperer's Amended Complaint and Demand for Jury Trial, which is printed as Appendix A to this reply brief, reveals that this statement is incorrect.

For instance, Counts I and II of Mr. Zipperer's amended complaint (App. A) allege that the City and County entities' failure to provide Mr. Zipperer with actual written notice of the special assessment hearings violated the Fourteenth Amendment to the United States Constitution and Article X, Section VI, of the Florida Constitution, was founded on an "improper motive" and was done through "arbitrary or pretextual means and had no rational basis." (App. A, paragraphs 41, 42, 44, 51, 52, 54). Additionally, Counts I and II of Mr. Zipperer's amended complaint also allege that the City and County entities' actions subordinating Mr. Zipperer's first mortgage lien amounted to an "illegal impairment of his contract rights" and violated Chapter 170, *Florida Statutes*,

because they "were not for a public purpose" and "did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed." (App. A, paragraphs 43, 47, 53, 57).

Furthermore, Count III and Count IV of Mr. Zipperer's amended complaint (App. A) challenge the City and County entities' failure to give Mr. Zipperer actual notice of the special assessment hearings as an unlawful act committed under color of State law in violation of 28 U.S.C. § 1983. Counts V and VI of Mr. Zipperer's amended complaint challenge the actions of the City and County entities as an illegal taking of Mr. Zipperer's property interest in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article X, Section VI, of the Florida Constitution. In the face of such allegations, Lee County's claim that Mr. Zipperer has conceded that these assessments were lawfully enacted is ludicrous.

Lee County also asserts that Mr. Zipperer has never challenged the legality of the state statutes involved. Even the City of Fort Myers recognizes the fallacy of this statement. On page 6 of its Brief in Opposition to Mr. Zipperer's Petition for Certiorari, the City of Fort Myers notes that Mr. Zipperer's complaint "asserts that his Fourteenth Amendment due process rights were violated by Florida law itself." Mr. Zipperer *has* challenged the legality of the notice provision of *Florida Statutes*, Chapter 170, (Section 170.07) because that notice provision does not provide for actual written notice to mortgagees such as Mr. Zipperer.

Lee County further claims that Mr. Zipperer never raised an objection in the "proceedings below" based on

the lack of benefit contributed by the special assessment improvements. Once again, even a brief perusal of the amended complaint belies Lee County's assertion. In numerous places in the amended complaint, Mr. Zipperer alleges that the assessment "improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed." (App. A, paragraphs 47, 57, 67, 78). Furthermore, Lee County's assertion that Mr. Zipperer never claimed that the assessments were confiscatory (Lee County Brief in Opposition, p. 2) is incomprehensible in light of Counts VI and VII of the amended complaint, which are causes of action alleging that the assessments on the Mortgaged Property "constitute an illegal taking of Mr. Zipperer's property." (App. A, paragraphs 82, 88).

Additionally, the City of Fort Myers also has made several misstatements of Mr. Zipperer's position in its Brief in Opposition to Mr. Zipperer's Petition for Certiorari. The City, on page 4 of its Brief in Opposition, asserts that Mr. Zipperer has conceded that the assessment procedures required by Florida law were followed. Mr. Zipperer, however, has never conceded this fact. Mr. Zipperer, in fact, has contended the United States Constitution *and* the Florida Constitution, *Florida Statutes* and Florida case law all have been violated by the City and County entities' actions in passing these special assessments. (*See* the discussions and amended complaint citations above and Counts VII and VIII of Mr. Zipperer's amended complaint [App. A], alleging breach of a common law duty, and Count IX of Mr. Zipperer's amended complaint, a cause of action against the City entities for illegal use of assessment funds.)

Finally, on page 7 of the City's Brief in Opposition to Mr. Zipperer's Petition, the City asserts that Mr. Zipperer has conceded that he retains a plain, speedy and efficient remedy to assert his objections to these assessments in State Court. In fact, Mr. Zipperer has never conceded this point and, in its opinion below, the Eleventh Circuit Court of Appeals specifically found that Mr. Zipperer had no such plain, speedy and efficient remedy. *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995) (*See* App. A, p. A7, of Mr. Zipperer's Petition for a Writ of Certiorari). (*See, also*, Mr. Zipperer's Brief in Opposition to the City of Fort Myers Cross-Petition for Certiorari on the Tax Injunction Act which has been filed simultaneously with this Reply Brief.)

ARGUMENT

In addition to the numerous factual errors in the City's and County's statements of Mr. Zipperer's position, Lee County and the City of Fort Myers attempt to justify their actions by characterizing Mr. Zipperer as an "improvident" investor (Lee County's Brief in Opposition, p. 5). It is, however, Lee County and the City of Fort Myers which are the actual improvident investors. Lee County and the City of Fort Myers assisted *a private developer* in gaining cheap construction financing (which a private lender probably would not have provided) for a development which was never built. They now seek to recoup some of their losses from Mr. Zipperer, an innocent lienholder who was not given written notice and an opportunity to object to the improvident activities of Lee County and the City of Fort Myers.

The primary case relied upon by both Lee County and the City of Fort Myers in their briefs in opposition to Mr. Zipperer's Petition for a Writ of Certiorari is *Federal Deposit Insurance Corporation v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991), which also is the case the Eleventh Circuit cited to support its opinion below. *See Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995). The *New Iberia* decision is fundamentally flawed for the same reasons that the Eleventh Circuit *Zipperer* decision is flawed and the arguments presented in Mr. Zipperer's Petition for a Writ of Certiorari also apply to distinguish the *New Iberia* decision. Briefly, the *New Iberia* court incorrectly held that, under *Louisiana law*, the imposition of a super-priority lien did not constitutionally impair a prior-recorded mortgagee's property right in the mortgagee's mortgage lien. The *New Iberia* court, like the *Zipperer* court, was of the opinion that the injury suffered by a mortgagee was not severe enough to warrant the constitutional protection provided by the due process clause. As Mr. Zipperer pointed out in his Petition for a Writ of Certiorari, that opinion is contrary to this Court's holdings in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798; *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 488 (1988); and *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991). Simply put, this Court *has* repeatedly held that governmental action does *not* have to totally extinguish a mortgagee's property right to trigger the protections of the due process clause.

Additionally, the *Florida* court with jurisdiction over the mortgaged lands and property in this case already has held that a super-priority provision in an ordinance *does* substantially and immediately impair the value of a

pre-existing mortgage lien such as Mr. Zipperer's. *Sarasota County v. Andrews*, 573 So.2d 113, 115 (Fla. Dist. Ct. App. 2d Dist. 1991). Furthermore, both the *New Iberia* and *Zipperer* courts overlooked the essential point that it is the *risk of deprivation*, and not a post-hoc rationalization of whether or not a deprivation actually occurred, which determines whether or not the due process clause applies.

Additionally, the other case law cited by the City does not support its position. The City's citation to *Utley v. City of St. Petersburg*, 292 U.S. 106 (1934) is misplaced because *Utley* involved a challenge to a special assessment brought by the landowners themselves and did not involve a challenge by a competing lienholder such as Mr. Zipperer. While the "improvements" imposed by a special assessment may benefit the landowner (provided that the value of the improvements at least equals the amount assessed) those "improvements" do not benefit a mortgagee. In fact, they immediately and substantially impair the value of the mortgagee's prior-recorded first mortgage lien. This fundamental difference between the effect the imposition of a super-priority special assessment lien has upon the respective property interests of a landowner and a mortgagee was overlooked by both the *New Iberia* court and the Eleventh Circuit panel which rendered the *Zipperer* opinion.

The City of Fort Myers attempts to gloss over this distinction by arguing that Mr. Zipperer's right to foreclose upon the mortgage is unaffected by the imposition of the super-priority special assessment liens. The City's assertion is untrue. Prior to the imposition of the super-priority special assessment lien, Mr. Zipperer was a *first* lienholder with a right to foreclose all other subsequent lienholders. After the imposition of the super-priority

special assessment liens, Mr. Zipperer no longer has the right to foreclose the subsequent special assessment liens imposed by the City of Fort Myers and Lee County. Furthermore, the value of Mr. Zipperer's mortgage as an instrument that can be bought and sold on the secondary market has been immediately and drastically reduced by the subordination of the prior-recorded first mortgage to a second lien status. *See Sarasota County v. Andrews*, 573 So.2d 113, 115 (Fla. Dist. Ct. App. 2d Dist. 1991).

Once again, the City has asserted that Mr. Zipperer may not challenge these assessments because, as a mortgagee, his interest in the property is derivative from that of the owner. This strange use of agency theory, to somehow bind the mortgagee through the actions of a mortgagor, simply is improper and inapplicable to the present situation. In fact, Mr. Zipperer's Mortgage prohibited any waste or impairment of the property by the Mortgagor. As the *Mennonite* court noted, the mortgagor's interests are not identical or aligned with the mortgagee's and notice to the mortgagor is not constitutionally sufficient notice to the mortgagee. *Mennonite*, 462 U.S. at 799.

The City's citation to *Wagner v. Leser*, 239 U.S. 207 (1915) is unpersuasive for three reasons. First, the *Wagner* court placed great emphasis upon the fact that it was the State of Maryland's Legislature and not the local city government which imposed the special assessment. In this context, the court stated:

> Taking the decisions in this Court together, we think that it results that the *legislature* of a state may determine the amount to be assessed for a given improvement, and designate the lands and property benefitted thereby, upon which the assessment is to be made, without first giving an

> opportunity to the owners of the property to be assessed to be heard upon the amount of the assessment or the extent of the benefit conferred.
>
> *Id.* at 219.

In the present case, the Florida Legislature made no such determination of the amount to be assessed or the property to be benefitted by those alleged improvements.

Second, the *Wagner* court noted that there was no allegation or proof of a disproportion between the assessment made and the benefit conferred "as to suggest that the small tax levied upon this property would amount to an arbitrary exercise of the legislative power upon the subject." *Id.* at 220. In the present case, Mr. Zipperer has alleged that the alleged benefit conferred was vastly disproportionate to the amounts assessed.

Third, unlike the present case, the *Wagner* decision nowhere mentions the issue of whether or not the imposition of a *super-priority lien* amounts to an immediate and substantial diminishment of a *mortgagee's* property interest. Like *Utley*, *Wagner* exclusively confines itself to the issue of whether or not the imposition of a special assessment confers a benefit upon the land itself. Neither *Wagner* nor *Utley* confront the question of whether or not the imposition of a super-priority special assessment lien confers a benefit upon a first mortgage lien which is the question presented by the present case.

The City's citation of *Withnell v. Ruecking Construction Co.*, 249 U.S. 63 (1919) is also unpersuasive, as *Withnell* once again involved a landowner's and *not* a mortgagee's challenge to the special assessments. Additionally, the landowner in *Withnell* was not entitled to a hearing

because both the method *and the amount of the special assessment* were determined by legislative act (the Charter of the City of St. Louis). In the present case, the amount of the assessment was not controlled and determined by any legislative act.

Furthermore, the City's citation of these cases is, in essence, an attempt to beg the actual question of whether or not *mortgagees* are required to receive written notice of a special assessment hearing when the hearing itself is already provided for by statute. In the above three cases, the question was not who was required to receive notice but, rather, whether or not a hearing was required at all! Finally *Wagner, Withnell* and *Utley* were all decided in the pre-*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) era when due process protections were not as strong as they are today.

CONCLUSION

For the foregoing reasons, Mr. Zipperer respectfully requests that this court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

JOHN O. ZIPPERER, JR., an individual,

Plaintiff,

vs.

THE CITY OF FORT MYERS, a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park; FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17; IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT; IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK; IMPROVEMENT DISTRICT NO. 17; LEE COUNTY, a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the

Case No. 93-108-CIV-FTM-23D

FBN 280283

Governing Authority of the Dependant Special District known as Colonial Road Extension Improvement Special District; and COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT,

Defendants.
_____/

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, JOHN O. ZIPPERER, JR. ("Mr. Zipperer"), sues Defendants, THE CITY OF FORT MYERS ("City"), a chartered municipality and political subdivision of the State of Florida; FORT MYERS CITY COUNCIL, as Governing Authority of Improvement District No. 10, Northeast Colonial Sewer and Water Assessment District ("District 10 Governing Authority"); FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 15, Omni Interstate Park ("District 15 Governing Authority"); FORT MYERS CITY COUNCIL, as the Governing Authority of Improvement District No. 17 ("District 17 Governing Authority"); IMPROVEMENT DISTRICT NO. 10, NORTHEAST COLONIAL SEWER AND WATER ASSESSMENT DISTRICT ("District 10"); IMPROVEMENT DISTRICT NO. 15, OMNI INTERSTATE PARK ("District 15"); IMPROVEMENT DISTRICT NO. 17 ("District 17"); LEE COUNTY ("County"), a political subdivision of the State of Florida; COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT BOARD, as the Governing Authority of the Dependant Special District known as Colonial Road Extension

Improvement Special District ("Board"), and COLONIAL ROAD EXTENSION IMPROVEMENT SPECIAL DISTRICT ("Special District"), and alleges:

GENERAL ALLEGATIONS

1. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 as a federal question action.

2. Plaintiff is a citizen of the State of Florida and a resident of Lee County, Florida.

3. City is a chartered municipality pursuant to Chapter 165, Florida Statutes, and a political subdivision of the State of Florida.

4. District 10 Governing Authority is the governing authority of District 10 pursuant to Chapter 170, Florida Statutes and Resolution No. 86-48 of the Fort Myers City Council, Florida ("City Council").

5. District 15 Governing Authority is the governing authority of District 15 pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 88-56.

6. District 15 Governing Authority is the governing authority of District 17, pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 86-64.

7. District 10 is an improvement district pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 86-48.

8. District 15 is an improvement district pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 86-48.

9. District 17 is an improvement district pursuant to Chapter 170, Florida Statutes and City Council Resolution No. 86-48.

10. County is a non-chartered political subdivision of the State of Florida.

11. Board is the governing authority of the Special District pursuant to Section 125.01, Chapter 170 and Chapter 189, Florida Statutes, and Lee County Ordinance No. 90-08.

12. Special District is a Dependant Special District pursuant to Section 125.01 and Chapter 189, Florida Statutes and Lee County Ordinance No. 90-08.

13. All conditions precedent to the relief requested herein have been performed, have occurred or have otherwise been waived.

14. Mr. Zipperer demands a jury trial on all issues.

FACTS

15. On August 14, 1986, P. Gerald DeSimone, Trustee ("DeSimone"), executed and delivered to Mr. Zipperer a Promissory Note in the principal amount of Eight Million Nine Hundred Thousand and No/100 Dollars ($8,900,000.00) which called for three (3) annual payments of interest only and thereafter for six (6) annual payments of principal and interest in the amount of One Million Five Hundred Eleven Thousand Two Hundred Twenty and No/100 Dollars ($1,511,220.00) with the remaining outstanding principal and all accrued interest to be due and payable on maturity on August 14, 1996. A true and correct copy of the Promissory Note is attached

to the original Complaint and incorporated herein as Exhibit 1.

16. On August 14, 1986, in order to secure the Promissory Note referred to above, DeSimone executed and delivered to Mr. Zipperer a Mortgage Deed which was recorded on August 14, 1986 in Official Record Book 1862, Pages 4282-4286, of the Public Records of Lee County, Florida and by which DeSimone granted to Mr. Zipperer a security interest in and to the real property described in the Mortgage Deed together with all oil, gas and mineral rights (the "Mortgaged Property"). In the Mortgage Deed, DeSimone warranted that the Mortgaged Property was free from all encumbrances. The mortgage had no provision providing for any subordination of Mr. Zipperer's mortgage to any subsequent development or construction financing and, indeed, Mr. Zipperer specifically objected to any such provision when the mortgage terms were negotiated. In addition, the Mortgage Deed which was recorded and thus giving constructive notice to anyone attempting to impose a subsequent lien on the property, contains a provision expressly prohibiting "waste, *impairment* or deterioration of said property or any part thereof." A true and correct copy of the Mortgage Deed is attached to the original Complaint and incorporated herein as Exhibit 2.

17. On November 18, 1986, Mr. Zipperer and DeSimone entered into a Mortgage Modification Agreement which was recorded on December 9, 1986, in official Record Book 1884, Pages 1456-1457, of the Public Records of Lee County, Florida and which modified the terms of the Mortgage Deed to include as security for the Promissory Note all oil and mineral rights to the real property

described in Exhibit 3, attached to the original Complaint and incorporated herein by reference. A true and correct copy of the November 18, 1986 Mortgage Modification Agreement is attached to the original Complaint and incorporated herein as Exhibit 4.

18. On October 26, 1990, Mr. Zipperer and DeSimone entered into a Mortgage Modification Agreement which was recorded on November 8, 1990, in Official Record Book 2185, Pages 4652-4654, of the Public Records of Lee County, Florida and which modified the terms of the Mortgage Deed to provide for a payment of unpaid interest and accrued interest thereon to be due and payable on December 1, 1990 and thereafter for annual payments of principal and interest commencing on August 14, 1992 with all remaining outstanding principal and accrued interest thereon to be due and payable at maturity on August 14, 1996. A true and correct copy of the October 26, 1990 Mortgage Modification Agreement is attached to the original Complaint and incorporated herein as Exhibit 5.

19. Mr. Zipperer owns and holds the Mortgage Deed, Promissory Note, November 18, 1986 Mortgage Modification Agreement and the October 26, 1990 Mortgage Modification Agreement. Under Florida law, the subordination of a preexisting mortgage from a first to a second lien position is recognized as an immediate impairment. Any subordination automatically puts the preexisting mortgagee at a substantially greater risk of losing its investment if it has a second, as opposed to a first, priority lien without even considering the value of the underlying property.

20. The Mortgaged Property is made up of Parcel Nos. 27-44-25-OC-08606.0000 ("8606"), 26-44-25-OC-08602.0000 ("8602"), and 22-44-25-OC-08601.0000 ("8601").

21. Pursuant to City Council Resolution No. 88-28, as amended by City Council Resolution No. 90-46, a Development Order was issued for Omni Interstate Park, which includes the Mortgaged Property.

DISTRICT 10

22. On September 22, 1986, City Council entered Resolution No. 86-48 which created District 10 in the City of Fort Myers, Florida and in Lee County, Florida. District 10, which included the Mortgaged Property, was created pursuant to Chapter 170, Florida Statutes, "for the construction of local sanitary sewage transmission mains, lift stations, water transmission mains, and other appurtenant facilities." The estimated cost of construction in District 10 was $13,000,000.00 with $10,000,000.00 to be borne by the properties in District 10, including the Mortgaged Property. A true and correct copy of Resolution No. 86-48 is attached to the original Complaint and incorporated herein as Exhibit 6.

23. Through Resolution No. 88-5 of February 16, 1988, the District 10 Governing Authority adopted the assessment roll for District 10. Resolution No. 88-5 contemplated that property owners and "other persons interested" in the property (presumably other directly affected persons, such as mortgagees) could appear before the District 10 Governing Authority to be heard as to the

propriety and advisability of the improvements to District 10, the assessments and the method of assessment. However, Resolution No. 88-5 only directed that property owners receive written notice of the meeting to be held to discuss these issues. Nowhere did Resolution No. 88-5 provide for written notice to mortgagees or any other interested parties, though mortgagees could have been easily identified through the public records. In fact, the City Clerk or consulting engineer did review the public records to locate the names of the property owners to receive the written notice. Given that fact, deriving from those same public records the identity of prior recorded mortgages and providing written notice to those mortgagees that special assessment that would subordinate their lien mortgage was under consideration would have been a very straight forward matter. The additional administrative "burden" would thus have been the few additional minutes of title search by the person already looking for the property owners to locate the mortgages, typing a letter and envelope and a stamp. Given the fact that $377,000.00 out of the $10,000,000.00 went directly to the City for "administration," this "burden" is not unreasonable. The assessment roll attached to Resolution No. 88-5 included Parcel Nos. 8601 and 8602, but did not include Parcel No. 8606. A true and correct copy of Resolution No. 88-5 is attached hereto and incorporated herein as Exhibit 7.

24. Through Resolution No. 88-8 of March 7, 1988, the District 10 Governing Authority levied certain special assessments on the properties on the District 10 assessment roll and "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the

assessments as legal, valid and binding first liens, coequal with the lien of other taxes and superior to all other liens, titles and claims, until paid. Resolution No. 88-8 directed the City Clerk to record the assessments. Resolution No. 88-8 was recorded in Official Record Book 2002, Pages 2419-2430 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 88-8 is attached to the original Complaint and incorporated herein as Exhibit 8.

25. Through Resolution No. 89-70 of November 6, 1989, the District 10 Governing Authority authorized the City Clerk to file a lien on the District 10 properties, including the Mortgaged Property for the unpaid pro rata cost of improvements made in District 10. Resolution No. 89-70 included Parcel Nos. 8801, 8802 and 8806. Resolution No. 89-70 was recorded in Official Record Book 2109, Pages 3829-3838 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 89-70 is attached to the original Complaint and incorporated herein as Exhibit 9.

26. Although the actual improvements for Phase I of the District 10 improvements were only $8,235,757.00, through Resolution No. 89-70, the District 10 Governing Authority authorized the liening of the District 10 properties, including the Mortgaged Property, for a pro rata cost per acre for $10,000,000, that is, the full amount of the estimated cost of improvements to be borne by the District 10 properties.

27. Although Mr. Zipperer was a prior mortgage holder through the Mortgage Deed which is Exhibit 2, Mr. Zipperer was not given actual written notice of the

proposed District 10 assessments, nor any of the other proposed Districts described below, explaining that the assessments would become a "first lien" over his first mortgage.

DISTRICT 15.

28. On October 17, 1988, City Council entered Resolution No. 88-56 which created District 15 in the City of Fort Myers, Florida. District 15, which included the Mortgaged Property, was created pursuant to Chapter 170, Florida Statutes, "for the construction of a water distribution system, wastewater collection system, paving improvements, including the construction of Omni Boulevard, S.E. entrance and Cypress Loop Road and other appurtenant facilities." The estimated cost of construction in District 15 was $10,900,000.00. A true and correct copy of Resolution No. 88-56 is attached to the original Complaint and incorporated herein as Exhibit 10.

29. Through Resolution No. 89-26 of April 17, 1989, the District 15 Governing Authority adopted the assessment roll for improvements to District 15. Resolution No. 89-26 contemplated that owners of the property and "other persons interested" (presumably other directly affected persons, such as mortgagees) in the property could appear before the District 15 Governing Authority to be heard as to the propriety and advisability of the improvements to District 15, the assessments, and the method of assessment. However, Resolution No. 89-26 only directed that property owners receive written notice of the meeting to be held to discuss these issues. *Nowhere* did Resolution No. 89-26 provide for written notice to

mortgagees or any other interested parties, though mortgagees could have been easily identified through the public records. The City Clerk or consulting engineers in fact did review the public records to locate the names of the property owners to receive the written notice. Given that fact, searching those same public records to determine the indentity [sic] of prior recorded mortgages and providing written notice to those mortgagees that a special assessment would subordinate their mortgage was under consideration would have been a very straight forward matter. The additional administrative "burden" would thus have been the few additional minutes of title search by the person already looking for the property owners to locate the mortgages, typing a letter and envelope and a stamp. Given the fact that $282,600.00 out of the $10,900,000.00 went directly to the City for "Administration," this "burden" is not unreasonable. The assessment roll included Parcels No. 8606, 8602, and 8601. A true and correct copy of Resolution No. 89-26 is attached to the original Complaint and incorporated herein as Exhibit 11.

30. Through Resolution No. 89-32 of May 15, 1989, the District 15 Governing Authority levied certain special assessments on the properties on the District 15 assessment roll and "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the assessments as legal, valid and binding first liens, coequal with liens of other taxes and superior to all of the liens, titles, and claims, until paid. Resolution No. 89-32 directed the City Clerk to record the assessments. Resolution No. 89-32 was recorded in official Record Book 2072, Pages 3091-3094 of the Public Records of Lee County,

Florida. These special assessments, as recorded in Resolution No. 89-32, have been imposed as a lien on the property. A true and correct copy of Resolution No. 89-32 is attached to the original Complaint and incorporated herein as Exhibit 12.

DISTRICT 17

31. On November 21, 1988, City Council entered Resolution No. 88-64 which created District 17 in the City of Fort Myers, Florida. District 17, which included the Mortgaged Property, was created pursuant to Chapter 170, Florida Statutes, for the design and installation of roadways and other appurtenant facilities. The estimated cost of construction in District 17 was $6,017,000.00. A true and correct copy of Resolution No. 88-64 is attached hereto and incorporated to the original Complaint as Exhibit 13.

32. Through Resolution No. 89-25 of April 17, 1989, the District 17 Governing Authority adopted the assessment roll for the improvements to District 17. Resolution No. 89-25 contemplated that owners of the property and "other persons interested" (presumably other directly affected persons, such as mortgagees) in the property could appear before the City Council to be heard as to the propriety and advisability of the improvements to District 17, the assessments, and the method of assessment. However, Resolution No. 89-25 only directed that property owners receive written notice of the meeting to discuss these issues. *Nowhere* did Resolution No. 89-25 provide for written notice to mortgagees or any other interested parties, although mortgagees could have been

easily identified through the public records. The City Clerk or consulting engineers in fact did review the public records to locate the names of the property owners to receive the written notice. Given that fact, searching those same public records to determine the identity of prior recorded mortgages and providing written notice to those mortgagees that a special assessment would subordinate their mortgage was under consideration would have been a very straight forward matter. The additional administrative "burden" would thus have been the few additional minutes of title search by the person already looking for the property owners to locate the mortgages, typing a letter and envelope and a stamp. Given the fact that $260,000.00 out of the $6,017,000.00 went directly to the City for Administration, this "burden" is not unreasonable. The assessment roll included Parcel Nos. 8606, 8602, and 8601. A true and correct copy of Resolution No. 89-25 is attached to the original Complaint and incorporated herein as Exhibit 14.

33. Through Resolution No. 89-33 of May 15, 1989, the District 17 Governing Authority levied certain special assessments on the properties on the District 17 assessment roll and "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the assessments as legal, valid, and binding first liens, coequal with liens of other taxes and superior to all other liens, titles, and claims, until paid. Resolution No. 89-33 directed the City Clerk to record the assessments. Resolution No. 89-33 was recorded in Official Record Book 2072, Pages 3095-3099 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 89-33

is attached to the original Complaint and incorporated herein as Exhibit 15.

SPECIAL DISTRICT

34. On October 11, 1989, DeSimone entered into an Agreement with the City and County to levy special assessments on the Mortgaged Property. A true and correct copy of the Agreement is attached to the original Complaint and incorporated herein as Exhibit 16.

35. On February 21, 1990, the Lee County Board of County Commissioners passed Ordinance No. 90-08 which created the Special District, pursuant to Section 125.01 and Chapter 189, Florida Statutes, included the Mortgaged Property, for road improvements in Lee County and the City of Fort Myers, Florida. Through Ordinance No. 90-08, the Board levied special assessments to finance the improvements. A true and correct copy of Ordinance No. 90-08. is attached to the original Complaint and incorporated herein as Exhibit 17.

36. On October 24, 1990, the Board entered Resolution No. 1 which ratified the substantial completion of the acquisition and construction of the Special District improvements. Resolution No. 1 indicated that notice had been given to the property owners of the hearing to discuss these improvements and the assessments. However, Resolution No. 1 made no mention of notice to mortgagees or any other interested parties, although mortgagees could have been easily identified through the public records. Presumably, someone at the County or at the County's direction reviewed the public records to locate the names of the property owners to receive the

written notice. In the process of conducting a title search to determine ownership, it would be an easy matter to also search for prior recorded mortgages. Providing such notice that a special assessment that would subordinate the mortgage was under consideration would be a "minor" burden and would only involve some slight additional title work, typing a letter and envelope and a stamp. The County contemplated that property owners and those interested in the property could attend the hearing, however, notice was only given to the owners. Resolution No. 1 provides that the special assessments would constitute a lien upon the property, a first lien superior in dignity to all other liens, titles, and claims, until paid. The amount assessed on the Omni Interstate Park property, which includes the Mortgaged Property, as part of the Special District was $1,000,000.00. A true and correct copy of Resolution No. 1 is attached to the original Complaint and incorporated herein as Exhibit 18.

37. On September 21, 1990, DeSimone entered into a Supplemental Agreement with the City and County to levy special assessments on the Mortgaged Property. A true and correct copy of the Supplemental Agreement is attached to the original Complaint and incorporated herein as Exhibit 19.

38. Through Resolution No. 2 of October 24, 1990, the Board adopted the assessments and imposed them on the properties in the Special District, including the Mortgaged Property. A true and correct copy of Resolution No. 2 is attached to the original Complaint and incorporated herein as Exhibit 20.

39. Through Resolution No. 3 of September 23, 1991, the Board "confirmed," self-servingly in that no bond validation proceeding was filed in the circuit court, the Agreement and Supplemental Agreement and the assessments and levied the assessments on the Special District Property, including the Mortgaged Property. Resolution No. 3 was recorded in official Record Book 2299, Pages 426-446 of the Public Records of Lee County, Florida. A true and correct copy of Resolution No. 3 is attached to the original Complaint and incorporated herein as Exhibit 21.

COUNT I

Cause of Action Against City, District 10 Governing Authority, District 15 Governing Authority, District 17 Governing Authority, District 10, District 15 and District 17:
Denial of Mr. Zipperer's Right to Due Process

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

40. The City, District 10 Governing Authority, District 15 Governing Authority, District 17 Governing Authority, District 10, District 15 and District 17 (hereinafter collectively "City Entities") failed to provide Mr. Zipperer with notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interest in the Mortgaged Property.

41. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida

Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

42. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property. Mr. Zipperer was also entitled to notice that the special assessment would become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property which would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County and expressly prohibited any impairment. The Mortgage Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

43. The Resolutions which the City Entities passed to levy special assessments on the District 10, 15 and 17 properties, including the Mortgaged Property, were adopted pursuant to including the provisions of Chapter 170, Florida Statutes. Chapter 170, Florida Statutes provides supplemental and alternative methods for making local and municipal improvements. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the land to be assessed. Section 170.07, Florida Statutes, provides that the governing authority, in

this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed, or any other interested persons, may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Section 170.07, Florida Statutes also provides that ten (10) days written notice in writing of the hearing time and place shall be given to the property owners by certified mail. Section 170.09, Florida Statutes provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

44. The City Entities never provided Mr. Zipperer, a holder of a mortgage and security interest in the Mortgaged Property which was part of the property affected by the Resolutions, with actual written notice that the City Entities intended to impose a special assessment upon the Mortgaged Property and that the special assessment would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property. The City Entities' failure to notify Mr. Zipperer was founded on an improper motive, particularly given the ease with which the City Entities could have of [sic] provided notice to lien holders, with a desire to protect only their interests at the expense and in wilful disregard of the rights of innocent lien holders. In addition, the City Entities failure to notify Mr. Zipperer was done through arbitrary or pretextual means and had no rational basis.

45. The City Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Districts 10, 15, and 17. Indeed, it is required by law that the mortgagee be notified, and the mortgagee is required to

join in such things as a plat which is recorded after the mortgage. See Section 177.081, Florida Statutes.

46. Mr. Zipperer was entitled to written notice reasonably calculated under all the circumstances to apprise him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property, which was included in Districts 10, 15, and 17, to notice of the proposed special assessments and their nature.

47. As a direct and proximate result of the City Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subrogated by operation of law to the status behind the District 10, 15 and 17 special assessment liens and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which assesses the land subject to Mr. Zipperer's mortgage, has no frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

48. Because the City Entities failed to provide the requisite written notice reasonably calculated under the circumstances to apprise Mr. Zipperer of the pendency of an action which materially affected his security interest in

the Mortgaged Property, the liens attached to the Mortgaged Property through Parcels 8606, 8602, and 8601 for Districts 10, 15, and 17 should be subordinated as junior liens to Mr. Zipperer's purchase money mortgage and foreclosed.

49. The City Entities denied Mr. Zipperer his right to due process, as provided under the United States and Florida Constitutions.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritization of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment lien, compensatory damages, the cost of this action, and other such relief as the Court deems just, necessary, and proper.

COUNT II

Cause of Action Against County,
Board and Special District:
Denial of Mr. Zipperer's Right to Due Process

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

50. County, Board and Special District (hereinafter collectively "County Entities") failed to provide Mr. Zipperer with written notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interest in the Mortgaged Property.

51. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida

Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

52. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property. Mr. Zipperer was also entitled to written notice that the special assessment would become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property which would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County. The Mortgage Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

53. The Ordinance and Resolutions which the Board passed to levy special assessments on the special District properties, including the Mortgaged Property, were adopted pursuant to the provisions of Section 125.01 Chapter 170 and Chapter 189, Florida Statutes. Section 125.01, Florida Statutes provides supplemental and alternative methods for making local improvements. Chapter 170, Florida Statutes provides supplemental and alternative methods for making local and municipal improvements. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the land to be

assessed. Section 170.07, Florida Statutes, provides that the governing authority, in this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed, or any other interested persons, may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Section 170.07, Florida Statutes also provides that ten (10) days' notice in writing of the hearing time and place shall be given to the property owners by certified mail. Section 170.09, Florida Statutes provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

54. The County Entities never provided Mr. Zipperer, a holder of a mortgage and security interest in the Mortgaged Property which was part of the property affected by the Ordinance and Resolutions, with actual written notice that the County Entities intended to impose a special assessment upon the Mortgaged Property and that the special assessment would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property. The County Entities' failure to notify Mr. Zipperer was founded on an improper motive, particularly given the ease with which the County Entities could have provided written notice to lien holders, with a desire to protect only their interests at the expense and in wilful disregard of the rights of innocent lien holders. In addition, the County Entities failure to notify Mr. Zipperer was done through arbitrary or pretextual means and had no rational basis.

55. The County Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Special District. Indeed, it is required by law that the mortgagee be notified, and the mortgagee is required to join in such things as a plat which is recorded after the mortgage. See Section 177.081, Florida Statutes.

56. Mr. Zipperer was entitled to written notice reasonably calculated under all the circumstances to apprise him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property, which was included in Special District, to notice of the Special District special assessments and their nature.

57. As a direct and proximate result of the County Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subrogated by operation of law to the status of a junior lien, behind the Special District special assessment lien, and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which assesses the land subject to Mr. Zipperer's mortgage, has *no* frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

58. Because the county Entities failed to provide the requisite written notice reasonably calculated under the circumstances to apprise Mr. Zipperer of the pendency of an action which materially affected his security interest in the Mortgaged Property, the lien attached to the Mortgaged Property through Parcels 8606, 8602, and 8601 for Special District should be subordinated as a junior lien to Mr. Zipperer's purchase money mortgage and foreclosed.

59. The County Entities denied Mr. Zipperer his right to due process as provided under the United States and Florida Constitutions.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritizing of the liens, foreclosure of the Special District special assessment lien, equitable subordination of the Special District Special Assessment lien, compensatory damages, the costs of this action, and such other relief as the Court deems just, necessary, and proper.

COUNT III

Cause of Action Against City Entities: § 1983 Action

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

60. The City Entities acting under color of state law failed to provide Mr. Zipperer with written notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interest in the Mortgaged Property.

61. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

62. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property, special assessments would become a lien superior to Mr. Zipperer's security interest in the Mortgaged property and that would become superior to Mr. Zipperer's security interest in the Mortgaged Property which would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County. The Mortgage Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

63. The Resolutions which the City Entities passed to levy special assessments on the District 10, 15 and 17 properties, including the Mortgaged Property, were adopted pursuant to the provisions of Chapter 170, Florida Statutes. Chapter 170, Florida Statutes provides supplemental and alternative methods for making local and municipal improvements. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the

land to be assessed. Section 170.07, Florida Statutes, provides that the governing authority, in this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed or any other interested persons may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Section 170.07, Florida Statutes also provides that ten (10) days' notice in writing of the hearing time and place shall be given to the property owners by certified mail. Section 170.09, Florida Statutes provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

64. Under color of state law, the City Entities never provided Mr. Zipperer who held a mortgage and security interest in the Mortgaged Property, which was a part of the property affected by the Resolutions, with actual written notice that the City Entities intended to impose a special assessment upon the Mortgaged Property and that the special assessments would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property.

65. The City Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Districts 10, 15, and 17. Indeed, it is required by law that the mortgagee be notified, and the mortgagee is required to join in such things as a plat which is recorded after the mortgage. See Section 177.081, Florida Statutes.

66. Mr. Zipperer was entitled to written notice reasonably calculated under the circumstances to apprise

him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property which was included in Districts 10, 15, and 17 to notice of the proposed special assessments and their nature.

67. As a direct and proximate result of the City Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first Purchase money mortgage purportedly subrogated by operation of law to the status of a junior lien, behind the District 10, 15 and 17 special assessment liens and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which assesses the land subject to Mr. Zipperer's mortgage, has *no* frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

68. As a direct and proximate result of the City Entities' failure to provide written notice, Mr. Zipperer was required to retain the undersigned attorneys and is required to pay a reasonable fee for their services. Mr. Zipperer is entitled to a reasonable attorneys' fee as part of the cost pursuant to Title 42 U.S.C.A Section 1988.

69. Because the City Entities failed to provide the requisite written notice reasonably calculated to apprise

Mr. Zipperer under the circumstances of the pendency of an action which materially affected his security interest in the Mortgaged Property, the liens attached to the Mortgaged Property through Parcels 8606, 8602, and 8601 for Districts 10, 15, and 17 should be subordinated as junior liens to Mr. Zipperer's purchase money mortgage and foreclosed.

70. The City Entities acting under color of state law denied Mr. Zipperer his right to due process.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritizing of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment liens, compensatory damages, attorneys' fees, the costs of this action, and other such relief as the Court deems just, necessary, and proper.

COUNT IV

Cause of Action Against the County Entities: § 1983 Action

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

71. The County Entities acting under color of state law failed to provide Mr. Zipperer with written notice reasonably calculated to apprise him of the pendency of an action which materially altered his property interes: in the Mortgaged Property.

72. The Fourteenth Amendment to the United States Constitution and Article X, Section VI of the Florida

Constitution provide that no state shall deprive any person of life, liberty or property without due process of law.

73. Mr. Zipperer, as mortgagee, has a legally protected property interest and was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value of his security interest in the Mortgaged Property and that the special assessments would purportedly become a lien superior to Mr. Zipperer's security interest in the Mortgaged Property and that would subordinate his interest, particularly where Mr. Zipperer's security interest was easy to identify through the public records of Lee County. The Mortgage Deed's unencumbered interest and waste provisions should have put the City on notice that Mr. Zipperer's interest was a first lien and that that first lien contemplated that no diminishing in value of the security interest or subrogation of the first lien would occur, including diminished value and subrogation through the imposition of special assessment liens.

74. The Ordinance and Resolutions which the Board passed to levy special assessments on the Special District properties, including the Mortgaged Property, were adopted pursuant to the provisions of Section 125.01 Chapter 170 and Chapter 189, Florida Statutes. Section 125.01, Florida Statutes provides supplemental and alternative methods for making local improvements. Chapter 170, Florida Statutes provides supplemental and alternative methods for making local and municipal improvements. Section 170.07, Florida Statutes, provides that the governing authority, in this instance the District 10, 15 and 17 Governing Authorities, shall fix a time whereby the owners of property to be assessed, or any other

interested persons, may appear before the governing authority to be heard as to the propriety and advisability of making the improvements and the assessments. Any such improvements, however, must be for a public purpose and provide a benefit reasonably related to the amount of the assessment on the land to be assessed. Section 170.07, Florida Statutes also provides that ten (10) days notice in writing of the hearing time and place shall be given to the property owners by certified mail. Section 170.09, Florida Statutes provides the special assessment lien will be coequal with the lien of other taxes and superior to all other liens.

75. Under color of state law, the County Entities never provided Mr. Zipperer who held a mortgage and security interest in the Mortgaged Property, which was part of the property affected by the ordinance and Resolutions, with actual written notice that the County Entities intended to impose a special assessment upon the Mortgaged Property.

76. The County Entities could easily have determined Mr. Zipperer's interest as a mortgagee by conducting a title search of the properties contained within Special District. Indeed, it is required by law that the mortgagee be notified, and the mortgagee is required to join in such things as a plat that is recorded after the mortgage. See Section 177.081, Florida Statutes.

77. Mr. Zipperer was entitled to written notice reasonably calculated under the circumstances to apprise him of the pendency of the City Entities' action and to afford him the opportunity to present his objections to the action where such action affected his interest in the

Mortgaged Property. Specifically, Mr. Zipperer had an interest as the holder of a purchase money mortgage in the Mortgaged Property, which was included in Special District, to notice of the Special District special assessments and their nature.

78. As a direct and proximate result of the County Entities' failure to provide written notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subrogated by operation of law to the status of a junior lien, behind the Special District special assessment lien and suffered an illegal impairment and taking of his contract rights, without his prior knowledge. Furthermore, the improvements were not for a public purpose and did not provide a benefit reasonably related to the amount of the assessment on the land to be assessed. For example, District 17, which assesses the land subject to Mr. Zipperer's mortgage, has *no* frontage at all on the road that was built using the revenue from the bonds secured by the assessments.

79. As a direct and proximate result of the County Entities' failure to provide written notice, Mr. Zipperer was required to retain the undersigned attorneys and is required to pay a reasonable fee for their services. Mr. Zipperer is entitled to a reasonable attorneys' fee as part of the cost pursuant to Title 42 U.S.C.A Section 1988.

80. Because the County Entities failed to provide the requisite written notice reasonably calculated to apprise Mr. Zipperer under the circumstances of the pendency of an action which materially affected his security interest in the Mortgaged Property, the lien attached to

the Mortgaged Property through Parcels 86061 8602, and 8601 for Special District should be subordinated as junior liens to the purchase money mortgage and foreclosed.

81. The County Entities acting under color of state law denied Mr. Zipperer his right to due process as provided by the United States and Florida Constitutions.

WHEREFORE, Mr. Zipperer requests declaratory relief, a liens [sic], foreclosure of the Special District special assessment lien, equitable subordination of the Special District Special Assessment lien, compensatory damages, attorneys' fees, the costs of this action, and such other relief just, necessary, and proper.

COUNT V

Cause of Action Against City Entities:
Illegal Taking of Mr. Zipperer's Property

Mr. Zipperer realleges and incorporates herein by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

82. The assessments made on the Mortgaged Property pursuant to the Resolutions entered by the City Entities constitute an illegal taking of Mr. Zipperer Is [sic] property.

83. The Fifth and Fourteenth Amendments to the United States Constitution and Article X, Section VI of the Florida Constitution provide that no state shall deprive a person of property without just compensation.

84. Mr. Zipperer has a legally protected property interest and is entitled to compensation for a regulatory taking of his interest in the Mortgaged Property.

85. The Resolutions which the City Entities passed which levied special assessments on the Mortgaged Property denied Mr. Zipperer of all economically beneficial or productive use of the Mortgaged Property and preclude alienability of the Mortgaged Property. Furthermore, those Resolutions interfered with Mr. Zipperer's distinct, reasonable investment backed expectations for his interest in the Mortgaged Property.

86. As a direct and proximate result of the City Entities' regulatory taking of Mr. Zipperer's security interest in the Mortgaged Property, Mr. Zipperer lost a significant property interest and suffered an illegal impairment and taking of his contract rights because his first purchase money mortgage was purportedly subordinated by operation of law to a junior lien, behind the District 10, 15 and 17 special assessment liens.

87. The City Entities' regulatory taking deprived Mr. Zipperer of all economically beneficial and productive use of the Mortgaged Property and interfered with Mr. Zipperer's distinct reasonable investment backed expectations for the Mortgaged Property without just compensation.

WHEREFORE, Mr. Zipperer requests declaratory relief, prioritizing of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment lien, compensatory damages, the cost of this action and

other relief as the Court deems just, necessary and proper.

COUNT VI

Cause of Action Against the County Entities: Illegal Taking of Mr. Zipperer's Property

Mr. Zipperer realleges and incorporates herein by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

88. The assessments made on the Mortgaged Property pursuant to the Ordinance and Resolutions entered by the County Entities constitute an illegal taking of Mr. Zipperer's property.

89. The Fifth and Fourteenth Amendments to the United States Constitution and Article X, Section V, of the Florida Constitution provide that no state shall deprive a person of property without just compensation.

90. Mr. Zipperer has a legally protected property interest and is entitled to compensation for a regulatory taking of his interest in the Mortgaged Property.

91. The Ordinance and Resolutions which the County Entities passed which levied a special assessment on the Mortgaged Property denied Mr. Zipperer of all economically beneficial or productive use of the Mortgaged Property and preclude alienability of the Mortgaged Property. Furthermore, those Resolutions interfered with Mr. Zipperer's distinct, reasonable investment backed expectations for his interest in the Mortgaged Property.

92. As a direct and proximate result of the County Entities' regulatory taking of Mr. Zipperer's security interest in the Mortgaged Property, Mr. Zipperer lost a significant property interest and suffered an illegal impairment and taking of his contract rights because his first purchase money mortgage was purportedly subordinated by operation of law to a junior lien, behind the Special District special assessment lien.

93. The County Entities' regulatory taking deprived Mr. Zipperer of all economically beneficial and productive use of the Mortgaged Property and interfered with Mr. Zipperer's distinct reasonable investment backed expectations for the Mortgaged Property, without just compensation.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritizing of the liens, foreclosure of the Special District special assessment lien, equitable subordination of the Special District Special Assessment lien, compensatory damages, the cost of this action and other relief as the Court deems just, necessary and proper.

COUNT VII

Cause of Action Against City Entities: Breach of Common Law Duty

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

94. The City Entities had a common law duty to provide Mr. Zipperer, a Mortgagee with a legally protected property interest, with notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value his security interest in the Mortgaged Property.

95. The City Entities breached that duty by failing to conduct a title search of the District 10, 15 and 17 properties which would have revealed that Mr. Zipperer had a mortgage and security interest in the Mortgaged Property, part of those Districts, and by failing to give Mr. Zipperer the requisite notice of the pending special assessments which would affect his security interest in the Mortgaged Property.

96. As a direct and proximate result of the City Entities' failure to conduct the title search and failure to provide Mr. Zipperer with the required notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subordinated by operation of law to the status of a junior lien, behind the District 10, 15, and 17 special assessment liens, without his prior knowledge.

WHEREFORE, Mr. Zipperer requests declaratory relief, prioritizing of the liens, foreclosure of the District 10, 15 and 17 special assessment liens, equitable subordination of the District 10, 15 and 17 Special Assessment lien, compensatory damages, the costs of this action, and such other relief as the Court deems just, necessary, and proper.

COUNT VIII

Cause of Action Against County Entities: Breach of Common Law Duty

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

97. The County Entities had a common law duty to provide Mr. Zipperer, a Mortgagee with a legally protected property interest, with notice reasonably calculated under the circumstances to apprise him of the pendency of an action which would diminish the value his security interest in the Mortgaged Property.

98. The County Entities breached that duty by failing to conduct a title search of the Special District properties which would have revealed that Mr. Zipperer had a mortgage and security interest in the Mortgaged Property, part of the Special District, and failing to give Mr. Zipperer the requisite notice of the pending special assessments which would affect his security interest in the Mortgaged Property.

99. As a direct and proximate result of the County Entities' failure to conduct the title search and failure to provide Mr. Zipperer with the required notice, Mr. Zipperer lost a significant property interest in having his first purchase money mortgage purportedly subrogated by operation of law to the status of a junior lien, behind the Special District special assessment lien, without his prior knowledge.

WHEREFORE, Mr. Zipperer requests declaratory relief, a prioritizing of the liens, foreclosure of the Special

District assessment lien, equitable subordination of the Special District Special Assessment lien, compensatory damages, the costs of this action, and such other relief as the Court deems just, necessary and proper.

COUNT IX

Cause of Action Against City Entities: Illegal Use of Funds

Mr. Zipperer realleges and incorporates by reference the allegations contained in paragraphs 1 through 39 as if fully set forth herein.

100. On information and belief, the City Entities reimbursed DeSimone for expenses incurred in obtaining a Development of Regional Impact ("DRI") Development order, Resolution Nos. 88-28 and 90-46.

101. DeSimone requested that the City Entities establish special assessment districts to provide a means for financing public improvements on the property known as Omni Interstate Park, which includes the Mortgaged Property.

102. The special assessment districts were implemented through the Resolutions for Districts 10, 15, and 17.

103. The City Entities agreed to reimburse and did reimburse DeSimone for the costs related to the public improvements including obtaining the DRI Development Order.

104. It is not necessary to obtain a DRI Development Order to provide the public improvements made pursuant to Districts 10, 15 and 17.

105. The infrastructure and public improvements made to Districts 10, 15 and 17 are not included in any statutory DRI category or threshold but are a necessary and fundamental component of all development projects.

106. Districts 10, 15 and 17 were created pursuant to Chapter 170, Florida Statutes. Special assessments for districts created under Chapter 170 may be levied only for the purposes enumerated in Section 170.01, Florida Statutes. These purposes do not include obtaining a DRI Development Order. Only costs necessary and incident to the improvements in the special assessment district may be reimbursed. Because the DRI Development Order is not necessary or incident to the improvements, it is not a reimbursable cost. The City Entities' reimbursement of DeSimone for these costs was illegal.

107. Article VII, Section X of the Florida Constitution prohibits the expenditure of public funds for a private purpose. Reimbursing costs which are not necessary or incident to improvements made in a special assessment district, such as DRI costs, are a prohibited expenditure of public funds for a private purpose. The City Entities' reimbursement of DeSimone for these costs was illegal.

108. Special assessments constitute a peculiar form of taxation and are levied under the taxing power of the state which is limited by Article VII, Section I of the Florida Constitution which therefore limits the City Entities' powers of taxation in Districts 10, 15 and 17 to only

those permissible taxes. The City Entities' taxing through Districts 10, 15 and 17 for the DRI costs were not within their permissible taxing powers and was illegal.

109. Because the City Entities reimbursed DeSimone for DRI expenses which are not necessary and incident to the District 10, 15 and 17 improvements, expended public funds for a private purpose and taxed outside their permissible taxing powers, the City Entities have illegally used special assessment funds which were obtained by assessing the Mortgaged Property and illegally taken Mr. Zipperer's property interest by purportedly subordinating those interests to a lien based on an illegal expenditure of funds.

WHEREFORE, Mr. Zipperer requests compensatory damages, the cost of this action and all other relief the Court deems just, necessary and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to Jacqueline W. Hubbard, Esquire, City Attorney, P.O. Drawer 2217, Ft. Myers, Florida 33902; Theodore L. Tripp, Jr., Esquire, Garvin & Tripp, P.O. Drawer 2040, Ft. Myers, Florida 33902; John S. Turner, Esquire, Lee County Attorney, P.O. Box 398, Ft. Myers, Florida 33902-0398, and Kathleen E. Moore, Assistant Attorney General, The

Capitol – Suite PL-01, Tallahassee, Florida 32399-1050, on this 27th day of October.

/s/ John H. Rains III
John H. Rains, III FBN 280283
Trial Counsel
Joseph N. Tucker FBN 938297
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